SUPREME COURT OF THE

OCTOBER TERM, 19

No. 213

TWISP MINING & SMELTING COMPANY,
A Corporation,

Appellant,

vs.

CHELAN MINING COMPANY, A Corporation; SEATTLE FIRST NATIONAL BANK, Trustee in Bankruptcy of the Alta Group Mining & Smelting Company, a Defunct Corporation, and Mentor Gold Corporation, a Corporation,

Respondents.

APPEAL FROM THE SUPREME COURT OF WASHINGTON.

STATEMENT AS TO JURISDICTION.

Charles C. Dill,
E. A. Shorett,
Counsel for Appellant.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 213

TWISP MINING & SMELTING COMPANY,
A CORPORATION,

Appellant,

vs.

CHELAN MINING COMPANY, A CORPORATION; SEATTLE FIRST NATIONAL BANK, ACTING AS RECEIVER OF THE ALDER GROUP MINING & SMELTING COMPANY, A DEFUNCT CORPORATION, AND METHOW GOLD CORPORATION, A CORPORATION.

FOREWORD.

All references in this "Statement As To Jurisdiction On Appeal" to matters found in the "Certified Unprinted Record of the Clerk of the State Supreme Court" shall be marked (R. —).

However, since Rule 10, Para. 4 of the Rules of this Court provides:

> "Whenever it shall be necessary or proper, in the opinion of the presiding judge in the court from which the appeal is taken that original papers of any kind should be inspected in this Court, such presiding judge may make such rule or order for the safe-keeping, transporting, and return of such original papers

as to him seem proper, and this court will receive and consider such original papers along with the usual transcript."

In conformity to that rule the Presiding Judge of the State Supreme Court has made such an order and the original exhibits, original transcript, original statement of facts, and the supplemental record, have been certified by the Clerk of the State Supreme Court, separately to the Clerk of the United States Supreme Court, as ORIGINAL RECORDS, to be returned to the Clerk of the State Supreme Court when this case is finally disposed of by this Court.

All references to such exhibits, transcript, statement of facts, or supplemental record, in this Statement As To Jurisdiction On Appeal, will be made as follows: (Original Ex. No. —), (Original Tr. —), (Original St. —), and (Supp. Rec. —).

STATEMENT AS TO JURISDICTION OF THE UNITED STATES SUPREME COURT ON THIS APPEAL.

MAY IT PLEASE THE COURT:

The appellant, in support of the jurisdiction of this Court to review the above entitled cause on appeal from the Supreme Court of the State of Washington, respectfully represents:

A.

Statutory Provisions Sustaining Jurisdiction.

The Act of February 13, 1925, Chapter 229, 43 Stat., 936, Effective May 13, 1925 (United States Judicial Code, Title 28, Section 344, provides that Section 237 (a) of the Judicial Code is amended to read as follows:

> "A final judgment or decree in any suit in the highest court of a state in which a decision in the suit could be had, where there is drawn in question * * * the validity of a statute of any state, on the grounds of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon writ of error. The writ shall have the same effect as if the judgment or decree had been rendered or passed in a court of the United States. The Supreme Court may reverse, modify, or affirm the judgment or decree of such state court, and may, in its discretion, award execution or remand the cause to the court from which it was removed by the writ."

Also, the Act of January 31, 1928, Chapter 14, 45 Stat., 54, provides:

> "Be it enacted by the Senate and House of Representatives of the United States of America In Congress, that writs of error in causes, civil and criminal, is abolished. All relief which heretofore could be obtained by writ of error shall hereafter be obtained by appeal."

Also, the Act of April 26, 1928, Chapter 440, 45 Stat., 466, amended Section 2 of the Act of January 31, 1928, to read as follows:

> "The statute regulating the right to writ of error, defining the relief which may be had thereon, and prescribing the mode of exercising that right and of invoking such relief, including the provisions relating to costs, supersedeas, with mandate, shall be applicable to the appeal which the preceding section substitutes for writ of error."

B.

State Statutes, the Validity of Which Is Involved On This Appeal.

The Uniform Business Corporation Act of the State of Washington of 1933, went into full force and effect on Janu-

ary 1, 1934, and Section 3803-11, Para. 1, of Remington's Revised Statutes (Supp.), expressly provides:

> "A corporation which has been formed under this act, or a corporation which existed at the time this act took effect and of a class which might be formed under this act, shall have the capacity to act possessed by natural persons, *but such a corporation shall have authority to perform only such acts as are necessary or proper to accomplish its purposes and which are not repugnant to law.*" (Italics ours).

And, Section 3803-26, of Rem. Rev. Stat. (Supp.), provides:

> "Para. 1. The shareholders of a corporation may make and alter by-laws not inconsistent with law or the articles of incorporation."

The Articles of Incorporation of the Twisp Mining & Smelting Company, appellant herein, expressly provides:

> "The powers of the corporation shall be exercised through and its business shall be conducted by a Board of Seven Trustees * * *" (R. 3).

And, Section 3803-31, Para. 3, subdivision (d), Rem. Rev. Stat., (Supp.), expressly provides:

> "A majority of the board of directors shall be necessary to constitute a quorum for the transaction of business, and the acts of a majority of the directors present at a meeting at which a quorum is present shall be the acts of the board of directors."

And, Article 11, Section 6, of the By-Laws of the appellant corporation, provides:

> "*A majority of the Board of Trustees,* for the time being in office, shall constitute a quorum for the transaction of business, but, if at any meeting of the Board there shall be less than a quorum present, a majority of those present may adjourn the meeting from time to time until a quorum be present" (R. 3 and 4). (Italics ours).

That By-Law expressly provides that a "*Majority of the Board of Trustees,* for the time being in office, shall constitute a quorum for the transaction of business." It does not provide that, if there are any vacancies on the Board of Seven Trustees at any time, that the minority trustees of the entire Board of Trustees have any power to transact any business of the appellant corporation.

The "Powers" of the Minority of the Board of Seven Trustees, is positively defined under Article 11, Section 5, of the By-Laws of appellant corporation, to-wit:

> "If any vacancy shall occur among the trustees by death, resignation or otherwise, the remaining trustees, by an affirmative vote of the majority thereof may elect a successor to hold office for the unexpired term of the trustee whose place shall be vacant and until the election of his successor." (See Original By-Laws on file with the clerk of this Court, under Ex. 7).

The trial Judge, held in his Memo Opinion of February 5, 1942:

> "I am compelled to conclude that the action of those purporting to constitute the Board of Trustees of the Twisp Mining & Smelting Company was legal and valid. I think this for various reasons: One of the most cogent of these reasons being that the By-Laws of the corporation provide in regard to a quorum as follows:
>
> 'A majority of the Board of Trustees, for the time being in office, shall constitute a quorum for the transaction of business'.
>
> "It appears by the minutes of a meeting held August 15, 1932, that the resignation of John B. Hottel and Chas W. Julian as trustees was accepted and John Goetz and Frederick C. McDonald were elected as trustees to fill the vacancy. See Pltf's Ex. No. 7, Mr. James **O. Cull** • • • *testified that neither Goetz nor McDonald ever qualified nor as much as sent in*

> *anything to signify that they had accepted their appointments on the Board of Trustees.* * * * This being the situation I am constrained to hold that neither Goetz nor McDonald ever became a member of the Board of Trustees of the Twisp Mining & Smelting Company. Hence, it follows that there were only five members in office during the month of January, 1934. * * * It of course obviously follows that if there was only five trustees in office during January, 1934, then three would be a majority and hence a quorum." (See Original Statement of Facts, page 353). (Italics ours).

The Twisp Company, appellant herein, filed a motion in the trial court to re-open the case for the admission of two original exhibits, which positively refuted James O. Cull's testimony on the trial of the case, that prompted the trial judge in believing that John Goetz had never qualified as a Trustee or as the President of the Twisp Company; and shows that James O. Cull, was present at a special meeting of the Board of Seven Trustees of the appellant corporation on August 15, 1932, when the agreement as to the purchase of a block of stock by John Goetz, as arranged by James O. Cull, attorney for the Twisp Company, was duly accepted and approved by a quorum of the Board of Seven Trustees at that special meeting; and, that James O. Cull did further cause that Board of Seven Trustees to elect John Goetz as a trustee and as the President of the Twisp Mining & Smelting Company so that John Goetz could carry out the agreement that Mr. Cull had arranged and further cause the Board of Seven Trustees to direct the secretary to issue and sign certificates of the capital stock of the Twisp Company, at the request of John Goetz, in the name of John B. Hottel and send said certificates to John Goetz for his signature as President of the Twisp Company and for delivery to John B. Hottel (R. 5 and 6).

Attached to that motion to re-open was a photostatic copy of one of the certificates of stock that was signed by John Goetz, as President of the Twisp Company of the date of August 16, 1932, and a photostatic copy of a letter of James O. Cull of the date of August 21, 1932. (St. A. I-16).

On the hearing of this Motion to Re-Open the case, appellant offered in evidence the Original certificate of stock bearing John Goetz's signature of the date of August 16, 1932, as President of the Twisp Company, and also the Original letter of James O. Cull of the date of August 21, 1932, and which, so far as material, stated:

> "My dear Magney,—Congratulations upon your new office of Vice-President of the Twisp Mining & Smelting Company. * * * At the Trustees meeting, Monday, we accepted the resignations of Hottel and Julian, *and elected Goetz and McDonald members of the Board.* We elected you as Vice-President, in the place of Hottel, and C. M. Hull as treasurer. Simonds remains as Secretary; *and Mr. Goetz was elected as President, in place of Sawbridge, who resigned as President, but not as trustee.* * * * The Armstrong Company and Smith, have agreed to the settlement; and Gillette's clients, in three cases, and Hull and Johnson's client, Mann, has refused settlement, and say they will proceed with the litigation. *I have written Mr. Goetz, asking his attitude and wishes; because he said we would proceed and litigate with them, and either settle in the end or defeat them.* * * * Yours very truly, James O. Cull." (Italics ours).

The trial Judge rejected said "Original Certificate" and "Original Letter of James O. Cull" (Ex. 63), and entered an order denying appellant's motion to re-open the case for that written confession of James O. Cull that his testimony on the trial that John Goetz never qualified as a "Trustee", or as "President", or as much as sent in anything to signify that he had accepted his appointment as "Trustee" or as "President", was not true. (See Tr. 136 and St. 353).

That ruling of the trial court was assigned as error to the State Supreme Court (R. 19), but the State Supreme Court never passed on that reversible error of the trial court and arbitrarily said:

> "We are satisfied that neither Mr. Goetz nor MacDonald were trustees of Twisp on January 17 or 30, 1934. They had never qualified as trustees, and their offices had been declared vacant." (R. 35).

The record shows that the appointments of Goetz and McDonald as trustees were never declared vacant, to-wit: On direct examination of Mr. Cull, he testified: "Q. Was anything done to declare those appointments void up until January 17, 1934? A. No, I am sure there never was any formal declaration of the fact." (St. 25, Original Statement of Facts).

Therefore, it is a settled fact that on January 17th and 30th, 1934, there were at least six trustees in office, namely, John C. Sawbridge, W. V. Coons, C. M. Hull, Harold Simonds, Roy K. Magney, and John Goetz, and only three were present on either date. Three trustees, of a Board of Seven Trustees, does not constitute a quorum. Even under the erroneous theory of the State Supreme Court that the majority of the trustees then in office constituted a quorum, three trustees do not constitute a quorum of the Six trustees then in office. The ruling of the trial court and the affirmance thereof by the State Supreme Court constitutes a plain denial to the appellant of a hearing on the merits of its Constitutional rights both State and Federal, under the ruling in *Powell* v. *Alabama,* 287, U. S. 45 at 68, 69, 77 ed. 158, 84 A. L. R. 527, where the court held:

> "If in any case, civil or criminal, a state or federal court were arbitrarily to refuse to hear a party by counsel, employed by and appearing for him, it reasonably may not be doubted that such a refusal would

be a denial of a hearing, and, therefore of due process in the constitutional sense."

And the trial Judge, on February 25, 1942, filed a Supplemental Opinion, and said:

"Now we come down to, and I will take up the discussion of the validity of that deed. *As I said before, that thing has been a regular headache to me.* There is no principles underlying that controversy; it is just a matter of statutory construction, but in view of the fact that the Uniform Business Corporation Act of 1933, as it appears in section 31, Laws of 1933, Chapter 185, reads: "*except as otherwise prescribed in the Articles or By-Laws.*" therefore, without further discussion, I will say that I will let my memorandum decision heretofore written, stand on that point, and I will conclude that there was a quorum on January 30, 1934, and that such quorum authorized the quit claim deed." (See Original Statement of Facts, pp. 366, 367). (Italics ours).

He overlooked the fact that the Articles of Incorporation prescribe a Board of Seven Trustees, and the statute provides that there must be a majority of that board, or four trustees, to constitute a quorum to transact business. There could not be a different board prescribed by any By-Law for that is inconsistent with the Articles of Incorporation and the law on the subject.

The foregoing ruling of the trial Judge was assigned as error on the appeal of this cause to the State Supreme Court, and in passing on said error the Supreme Court in its opinion said:

"It is true the articles do provide the powers of the corporation shall be exercised through a board of seven trustees. It is also true that the articles do not say how many trustees shall constitute a quorum to transact business. However section 6, of article 2, of the by-laws, provides that a majority of the board of trus-

> tees, *for the time being in office,* shall constitute a quorum for the transaction of business." (R. 35).

And, appellant cited Fletcher's Cyc., on Corporations, Vol. 2, page 206, Section 421, providing:

> "The general * * * rule being the number necessary to constitute a quorum under a by-law which provides that a majority of the directors shall be necessary and sufficient to constitute a quorum, is the majority of the entire board, notwithstanding there may be vacancies on the board at the time." Citing Hotaling *v.* Hotaling (Cal.), 224 Pac. 435, as authority.

But, the State Supreme Court further said:

> "The next reference to Fletcher's Cyc., on Corporations is vol. 2, page 206, section 421, from which appellant quotes. This quotation is not applicable here, for the reason that it covers a situation where the by-laws provide 'that a majority of the directors shall be necessary to constitute a quorum,' not a majority of the trustees then in office, as in the instant case" (R. 38).

Manifestly, the State Supreme Court did not construe, Section 6 of Article 11, of the By-Laws as written, but on the contrary arbitrarily left out the words "Board of" and enacted a new By-Law, which it had no lawful power to do, that would provide:

> "A majority of the trustees then in office, shall constitute a quorum for the transaction of business of the Twisp Mining & Smelting Company."

The State Supreme Court in its opinion (R. 37), said:

> "Appellant argues that the overwhelming weight of authority, as stated in Fletcher's Cyc., on Corporations, Vol. 2, p. 168, Sec. 392, is that when the power to do particular acts, or general authority to manage the affairs of a corporation, is vested in a board of trustees, they are vested in the trustees not individually, but as

a board, and the trustees can act so as to bind the corporation only when they act as a board and at a legal meeting. Appellant states that the rule and the reasons therefore are well stated in Ames *v.* Goldfield Merger Mines Co., 227 Fed. 292. We may admit the above rule is a correct statement of the law, but we fail to see where it is applicable here. The meetings of January 17 and 30, 1934, were regularly called meetings. The directors met as a board, and a quorum of the directors *then in office being present,* proceeded as a board to transact the business of the corporation, referred to in the notice given of such meetings."

However, Article 11, Section 1 of the By-Laws of the Twisp Company, expressly provides:

> "The trustees shall act only as a board, and the individual trustee shall have no power as such" (R. 3).

And, Article 11, Section 5 of the By-Laws of the Twisp Company, expressly provides:

> "The Secretary shall give notice of each special meeting" (of the Board of Trustees) "by mail, the same to be at least two days before the meeting * * * to each trustee" (R. 4).

In *Bruch* v. *Nat. Guarantee Credit Corporation* (Del.), 116 Atl. 738, the court held:

> "Unless notice be given to each director, as required by by-laws of the corporation, the meeting is illegal, and action is not binding."

In *Enright, as Trustee in Bankruptcy* v. *Becksher,* 240 F. (2d C. C. A.), 963, the court held:

> "It seems from the minutes that there was five directors present, but Mr. Munford was interested in this transaction, and left the room or retired while the directors were considering this proposition, and was not present when it was acted upon. Of course, it

would constitute a quorum if he was there, even though he did not vote; but if he left the room, so as to leave only four directors present, and nine was required, it seems clear there would have been no meeting at the time the action was taken, therefore there could be no finding by the directors, as required by section 49 of the Corporation Act or law, that the value of the property transferred was equal to the value of the stock issued." The resolution (passed at that meeting) was held to be a nullity.

The record in this instant case shows that Mr. Cull testified as follows:

> *"I didn't send out formal notices for the January 17th meeting.* When Mr. Cole called attention to that we sent out notices and called a meeting for the 30th." (R. 6) (Italics ours).

The record further shows:

> "At said meeting, according to the testimony of Mr. Cull, Mr. Strong and James Cole, his personal attorney, were present, and Mr. Cole raised the question as to whether proper notice of this meeting had been given. Thereupon it was decided by those present to call a new meeting on January 30, 1934, so as to enable the Secretary to give proper notice, which was 8 days prior to the meeting. Notices were mailed to the trustees whom Mr. Cull considered as directors, but the notice to Roy K. Magney was not mailed out until January 24, 1934. * * * I" (Mr. Cull) *"did not send notices to MacDonald or Goetz."* (R. 9) (Italics ours.)

It is clear from Mr. Cull's own admissions, that the purported special meeting of the Board of Seven Trustees of January 17th, 1934, was not legally called, and those who were present admitted that fact and of necessity under such circumstances the pretended resolution passed at that time was an absolute nullity (R. 6).

The Chelan Mining Company, one of the appellees herein, was incorporated on January 26, 1934, and Robert H. Strong, James Cole and James O. Cull were named as the initial directors of a board of five directors; and on January 29, 1934, the initial organization meeting was held and Robert H. Strong was elected as President and James Cole and James O. Cull were elected as assistant secretaries; and Robert H. Strong, as president of the Chelan Mining Company, was duly authorized to proceed in the name of the Chelan Mining Company to obtain a transfer of the property and property rights of the Twisp Mining & Smelting Company (R. 9).

The record (R. 9 & 10), further shows:

> "On January 30, 1934, only three trustees of the appellant company appeared, John C. Sawbridge, C. M. Hull and W. V. Coons. At this meeting, James O. Cull, was elected as Secretary pro tem, and Robert H. Strong and James Cole, president and assistant secretary of the Chelan Mining Company were present."
>
> "At this meeting, the three trustees present, upon the advice of Mr. Cull, decided that John Goetz and Frederick C. MacDonald had failed to qualify as trustees and had decided not to fill the vacancies, but to treat the Board, as a Board of Five members and proceeded to readopt the purported resolution passed by the same three trustees on January 17, 1934 (R. 7 & 8). (Also see Original minutes of trustees' meeting of January 30, 1934, in Original Exhibit 7.)

The State Supreme Court in its opinion (R. 38), said:

> "A careful study of Fletcher will, in our opinion, reveal that the text recognizes that the number of directors of a corporation necessary to constitute a quorum may be fixed by the by-laws, if not incompatible with the articles or statutory law, and that a majority of that quorum may decide any question coming properly before such meeting, although the number of directors

present may be less than a majority of the entire board. Fletcher's Cyc., on Corporations, vol. 2, p. 210, sec. 425. See, also, 13 Am. Jur. 918, sec. 960, where the rule is stated as follows:

'Stating the rule in terms of necessity, it is equally well settled that a majority of the directors must be present at the meeting to constitute a quorum and enable the board to act and bind the corporation, *unless the power is given to a lesser number.* This is also the rule embodies in the Uniform Business Corporation Act.'" (Italics ours.)

"The authority cited by appellant does not purport to deal with a corporation which has a by-law such as we have in the instant case, and a discussion of such authorities would therefore serve no purpose. Having determined as a fact that there were but five trustees in office on January 17 and 30, 1934, whether or not a majority of that five constitutes a quorum is dependent entirely upon the interpretation of the section of the by-laws heretofore referred to, considered in connection with the articles and the statutory law. Having been cited to no authority that would prohibit a corporation from passing such a by-law, under conditions such as herein set out, we are of the opinion it was valid, and that the three directors, present and voting at the meeting of January 17, and 30, 1934, constituted a majority of the board then in office, that their acts were the valid acts of the board, and that the deed issued pursuant to the resolution adopted at the meeting of January 30, was a valid deed of the corporation."

The State Supreme Court was led into error by reason of the fact, as it stated (R. 37), that the special meeting of the Board of Seven Trustees of the Twisp Company was a regular called meeting, in view of Mr. Cull's own testimony (R. 6) that no formal notices as required by article 11, section 5 of the by-laws of the Twisp Company was ever given to each trustee and by the further fact that Mr. Cull who

sent out the notices for the special meeting of the Board of Seven Trustees of January 30, 1934, did not mail the notice to Roy K. Magney, one of the trustees, 8 days prior to January 30, 1934, as required by the resolution at the pretended special meeting of January 17, 1934, and did not send any notice to John Goetz who manifestly was a member of the Board of Seven Trustees of the Twisp Company.

The Court assumes under that state of facts that the pretended special meetings of the Board of Seven Trustees of January 17 and 30, 1934 were regularly called meetings; and further erred in assuming that under such a state of facts there was any valid resolution passed by the three minority trustees on Janury 17, 1934 or January 30, 1934; and in further assuming that there ever was any effective authorization by the Board of Seven Trustees of the Twisp Company, in whom was vested the sole power to give such authorization, to execute a quit claim deed of all the assets of the Twisp Mining & Smelting Company. (See *Hotaling* v. *Hotaling* (Cal.), 224 Pac. 435), for the reason stated in *Bruch* v. *Nat. Guarantee Credit Corporation* (Del.), 116 Atl. 738, to-wit:

> "Unless notice be given to each director, as required by by-laws of the corporation, the meeting is illegal, and action taken is not binding."

The fallacy of the State Supreme Court's interpretation of the effect of the by-law as stated in article 11, section 6 of the by-laws of the appellant corporation, which provides:

> "A majority of the Board of Trustees, for the time being in office, shall constitute a quorum for the transaction of business."

is determined by Section 3803-26 of Rem. Rev. Stat. (Supp.) of the Uniform Business Corporation Act of 1933, which provides:

> "1. The shareholders of a corporation may make and alter by-laws not inconsistent with law or articles of incorporation."

Fletcher's Cyc., on Corporations (Permanent Edition) Vol. 5, p. 69, Section 3013, provides:

> "A by-law providing what shall constitute a quorum is invalid and yields to the statute * * *"

Fletcher's Cyc., on Corporations (Permanent Edition) Vol. 8, p. 723, Section 4190, provides:

> "By-laws, to be valid, must be consistent with the terms and spirit of the charter of the corporation * * * A by-law which is not thus consistent with the charter, but in conflict with and repugnant to it is void."

In *Gentry-Futch Co.* v. *Gentry* (Florida) 106 So. 473, the court in a case, where a by-law of a corporation provided that no business should be transacted at any meeting without there being 75 per cent of the stock represented, held:

> "This provision of the by-laws is void, being in conflict with section 4082 of the Revised General statutes of 1920, which reads: 'A majority of the stock shall constitute a quorum at stockholders' meetings.' This announced a general statutory policy and principle which, of course, cannot be changed by a corporate by-law."

And under the Uniform Business Corporation Act, Sections 3803-37 & 3803-38 of Rem. Rev. Stat. (Supp.), the Articles of Incorporation can only be changed by a resolution of the Stockholders, in the manner provided by those statutes. *In re Dolgeville Electric Light & Power Co.*, 160 N. Y. 500, 55 N. E. 287, the court holds that the Board of Trustees as fixed by the Articles of Incorporation cannot be changed unless the statute regarding amendments have

been fully complied with, which was not done in this instant case.

The State Supreme Court in its opinion states:

> "After the conveyance by Mr. Strong and wife to Chelan Mining Company, that company issued to Twisp Company 250,000 shares of its stock, which were delivered to Mr. Cull and receipted for by him. *Twisp still holds this stock.*" (R. 29 & 30). (Italics ours.)

The court in making this statement, overlooked the fact conclusively shown by the record, that at that time Mr. Cull was attorney for Mr. Strong and the Chelan Mining Company and was also Assistant Secretary, Trustee, and local manager of that concern. It is obvious that Mr. Cull in thus causing a certificate in the Chelan Company to be issued in the Twisp Company and then holding it himself for a period of more than five years, did not constitute a delivery of the same to appellant company.

Mr. Cull's testimony shows that he received the certificate of stock on February 6, 1934, and that he held the certificate until April 5, 1939, at which time he told Mr. Blaesser and Mr. Magney he had the certificate. The new Board of Seven Trustees, of appellant company refused to accept it, and he still held the certificate at the time of the trial of the case in the Superior Court of Okanogan County, State of Washington, during the month of October, 1941 (R. 10 & 11).

By reason of that fact, the purported transaction of Robert H. Strong with the minority trustees on January 30, 1934, was never consummated. On April 24, 1939, the new Board of Seven Trustees repudiated the illegal transaction and disavowed the entire transaction (R. 12).

The Opinion of the State Supreme Court (R. 15 to 43), was filed on January 18, 1943; and the appellant, within the time allowed by the rules of the Court, duly filed with the

State Supreme Court its printed Petition and Supplemental Petition for a rehearing before the entire Supreme Court and contended as follows:

> "The Departmental decision substantially held that the by-laws of a corporation are on a higher plane than the articles of incorporation themselves. In order to reach the conclusion that the Department did reach, it is necessary for them to give full force to a by-law that was entirely contradictory to and inconsistent with the articles of incorporation. This was done without any citation of authorities and without any discussion as to whether or not the two were inconsistent, and if this decision is allowed to stand, it will revolutionize corporation law in this State and create a situation where no stockholder of a corporation may rely on the articles of incorporation themselves for his protection, but on the contrary, he will be subject to the whim and caprice of any Board of Directros which may see fit to change or alter the by-laws of the corporation from time to time. It is a matter of importance, far greater than this case itself. The case involves only the parties primarily interested therein, but the principle of law which the Department by its decision, will nullify the effect of the charter or articles of incorporation of any company organized under the laws of this state. The members of a corporation have a constitutional right to rely on the charter of the company being given full force and effect. The United States Constitution guarantees them that right. It is true they may be amended by the procedure specified for that purpose, *but they may not be amended by the legislature or by a court under the guise of judicial construction.* * * * (Italics ours.)
>
> "The Department in this instant case, construed, applied and enforced Article 11, Section 6 of the by-laws of the Twisp Company, as a law, which superseded and nullified the provisions of the Uniform Business Corporation Act in regard to what constituted a legal

quorum of a Board of Seven Trustees and as so construed, applied and enforced was repugnant to the Fourteenth Amendment of the Federal Constitution."

And further contended:

"The Departmental Opinion, after holding that there was a quorum present at the meeting of January 30, 1934, goes on to further assert that even if that meeting were not a valid meeting, appellant is estopped to question the rights of the respondents. In so holding, it seems to us that the Department has entirely ignored one of the principal elements of estoppel." (See Printed Supplemental Petition, which is attached to this Statement As To JURISDICTION ON APPEAL AND MARKED: "Appendix to Statement as to Jurisdiction on Appeal".)

And the State Supreme Court considered said Petition and Supplemental Petition and adhered to its Opinion of January 18, 1943, and on March 26, 1943, without writing any further opinion, entered an order which provides:

"The court having considered the appellant's petition and supplemental petition for a rehearing herein,

"IT IS ORDERED that the petitions be and they hereby are denied" (R. 44).

C.

Date of Judgment and Date of Application for Appeal.

The judgment of the State Supreme Court sought to be reviewed was entered on March 29, 1943 (R. 45).

The application for an order allowing the appeal was presented to the Chief Justice of the State Supreme Court on May 29th, 1943, and the order allowing the appeal was signed by the Chief Justice of the State Supreme Court on May 29th, 1943, and duly lodged on that same day with the

Clerk of the State Supreme Court for transportation to the Clerk of the United States Supreme Court (R. 53).

D.

Grounds Upon Which It Is Contended That Questions Involved Are Substantial.

This action was brought to recover real property and quiet title by removing the cloud of a deed, wrongfully made in the name of the Twisp Mining & Smelting Company by individuals, pretending to be the president and assistant secretary of the Twisp Company without authority or consideration moving to the Twisp Company, of date of January 31, 1934 (Ex. 20, herein), all of which facts were known to Robert H. Strong the vendee in said quit claim deed at the time he received the deed (R. 9).

Exhibit 20, shows on its face, that the property and property rights that are purported to be conveyed by said quit claim deed consisted of homestead lands, recorded in Book 76, of Deeds, page 416, on June 27, 1932; unpatented mining claims, recorded in Book 76, of Deeds, page 417, on June 27, 1932; and the assignment of an executory sale contract of three patented mining claims, by the Alder Group Mining & Smelting Company, as vendor, and the Twisp Mining & Smelting Company, as vendee by said assignment recorded in Volume 9 of Miscellaneous Records on June 27, 1932 and as further shown by the Original Exhibits Nos. 4, 5, 6, 6A & 6B, which are filed in the Clerk's office of this Court for inspection if desired by order of the State Supreme Court. All of the appellees base their pretended rights to the property and property rights on the purported rights that Robert H. Strong obtained by reason of the quit claim deed made in the name of the Twisp Mining & Smelting Company, Exhibit 20, of date of January 31, 1934.

It is settled, by the State Supreme Court in *Hutchinson Realty Co.* v. *Hutchinson,* 136 Wash. 184, 239 Pac. 388, that this instant action is not an action predicated on fraud, but is simply an action to try title to real property (Sections 785 & 786, Rem. Rev. Statutes), wherein "the superior title whether legal or equitable shall prevail." This action was commenced on May 7, 1940, within the seven year period, from January 31, 1934, the date of the purported deed, under Section 793, Rem. Rev. Stat.

The State Supreme Court in its opinion, says:

> "Appellant contends that the acts of the three directors were ultra vires, and therefore void, and being void, such acts could not be ratified or the company estopped from questioning the validity of the deed." (R. 40). And further says: "In the first place, the acts of the three directors in passing the resolution of January 30, 1934, and the execution of the deed were not acts ultra vires the corporation, for clearly the corporation was not prohibited from passing such resolution or from executing such a deed. The term 'ultra vires', in so far as it applies to corporate transactions which are outside the objects for which the corporation was created, as defined in the law of its organization, and therefore beyond the power conferred on the corporation by the legislature."

It is undisputed in this instant case, that during the month of January, 1934, that the Board of Trustees of the Twisp Company was a Board of Seven Trustees, because even the State Supreme Court in its opinion, says:

> "It is true the articles do provide the powers of the corporation shall be exercised through a board of seven trustees." (R. 35).
>
> "We are satisfied that neither Mr. Goetz nor Mr. MacDonald were trustees of Twisp on January 17, or 30, 1934. They had never qualified, and their offices had been declared vacant. This being true, there were

> on January 17 and 30, 1934, only five trustees of Twisp who were qualified to act, namely, Mr. Sawbridge, Mr. Coons, Mr. Hull, Mr. Simonds, and Roy Magney * * * " (R. 35, 36).

That is to say, that the Board of the Twisp Company was a Board of Seven Trustees on January 17 and 30, 1934, but there were two vacancies on that Board of Seven Trustees and that only five members were qualified to act, and Mr. Simonds and Mr. Roy Magney were not present, and the State Supreme Court of necessity then admits that there were only three trustees of the Board of Seven Trustees present on January 17 or 30, 1934, and three trustees did not constitute a legal quorum of the board of seven trustees of the Twisp Company.

Fletcher's Cyc., on Corporations, Vol. 3, pages 3044 to 3047, provides:

> "It is the board duly convened and acting as a board that is made the representatives of the corporation. The assent of determinations of members of the board acting separately and individually is not the assent of the corporation. The law proceeds upon the theory that the directors shall meet and consult with each other, and that any determination affecting the corporation shall only be arrived at and expressed after a consultation at a meeting of the members attended by at least a majority of its members. The governing body of a corporation, as such, are agents of the corporation only as a board and not individually. Hence it follows they have no authority to act, save when assembled at a board meeting. The separate action, individually, of a person composing such governing body, is not the action of the constituted body of men clothed with corporate powers."

In *Kent* v. *R. M. Co.*, 78 N. Y. 179, the court held:

> "The By-Laws of a corporation are only rules and regulations as to the manner in which a corporation's

power shall be exercised. *Any attempt on the part of the defendants, by By-Laws or otherwise to deprive an unconsenting stockholder of the right secured to him by corporate articles is in excess of defendant's authority, or in legal parlance, ULTRA VIRES.*" (Italics ours.)

In *Central Trans. Co.* v. *Pullman Car Co.*, 139 U. S. 24 to 61, 35 Law Ed. 55 to 68, the court in passing on this important question held:

"The views which this Court has taken of the question presented by this branch of the case and the only view which appears to us consistent with legal principles, is as follows:

A contract of a corporation, which is ultra vires, in the proper sense, that is to say, outside the object of its creation as defined in the law of its organization, and therefore beyond the powers conferred upon it by the legislature, is not voidable only, but wholly void, and of no legal effect. The objection to the contract is not merely that the corporation ought not to have made it but that it could not make it. The contract cannot be ratified by either. No performance on either side can give the unlawful contract any validity, or be the foundation of any right of action upon it. Where a corporation is acting within the general scope of the power conferred upon it by the legislature, the corporation, as well as persons contracting with it, may be estopped to deny that it has complied with the legal formalities which are requisites to its existence or to its action, because such requisites might in fact have been complied with. *But when the contract is beyond the powers conferred upon it by existing laws, neither the corporation, nor the other party to the contract, can be estopped, by assenting to it, or by acting upon it, to show that it was prohibited by those laws.* (Italics ours).

A contract ultra vires being unlawful and void, not because it is in itself immoral, but because the corpo-

> ration by the laws of its creation, is incapable of making it, the courts while refusing to maintain any action upon the unlawful contract, have always striven to do justice between the parties, so far as could be done consistently with adherence to law, by permitting property or money, parted with on the faith of the unlawful contract, to be recovered back, or compensated for it. In such case, however, the action is not maintained upon the unlawful contract, nor according to its terms, but on an implied contract of the defendant to return, or failure to do that, to make compensation for property or money which it has no right to retain. To maintain such an action is not to affirm, but to disaffirm, the unlawful contract."

The Uniform Business Corporation Act, expressly granted the Twisp Company a constitutional right to fix the number of trustees that was to constitute its board of trustees and the Twisp Company by reason of the power so granted by the legislature fixed its board, as a Board of Seven Trustees. It is true that the stockholders may have its articles of incorporation amended by procedure specified under sections 3803-37 and 3803-38 of Rem. Rev. Stat. (Supp.), but the articles of incorporation may not be amended by a court under the guise of judicial construction, or by by-law, which is inconsistent with the articles of incorporation.

In *Bergman* v. *St. Paul Mut. Bldg. Assn.* (Minn.), 13 N. W. 120, the court held:

> "The authority to pass by-laws is, as a matter of course, authority to pass such as are consistent with the articles and not to subvert the law of corporate existence." Also see Morewitz, Private Corporations, Sections 367, 368.

It is clear then, that the State Supreme Court, in construing, applying, and enforcing Article 11, Section 6 of the By-Laws of the Twisp Company, as a law; which

superseded and nullified the provisions of the Charter of the Twisp Company and the provisions of the Uniform Business Corporation Act in regard to what constituted a quorum of the Board of Seven Trustees; has placed a construction, application, and enforcement of that by-law as a law, which is repugnant to the Fourteenth Amendment of the Federal Constitution; and has abridged and cut off the protection of the stockholders of the Twisp Company provided under the Uniform Business Corporation Act, and in so doing has in fact denied the Twisp Company a hearing on the merits of its appeal.

These three minority trustees had no power or authority to amend the articles of incorporation of the Twisp Company, and under the foregoing authorities their attempt to so do did not constitute a corporate act and their unlawful attempt to do so was in excess of their power and authority and was in legal parlance, ultra vires.

In *Jarshe* v. *Farmers & Merchants State Bank* (N. H.), 206 N. W. 773, the court held:

> "Where * * *, the contract is illegal and void, as we have held the one here to be, no estoppel can be raised. * * * Counsel further argues that the plaintiff was an ignorant, unlettered man, who relied upon the honesty and good faith of those with whom he dealt; that he did not know the contract was ultra vires and unlawful. But plaintiff when he entered into the contract, whatever his ignorance or actual knowledge of the law, was charged with the knowledge of the law."

And, in this instant case, Mr. Strong, was not an ignorant person. He was present at the pretended meetings of January 17, 1934, with his own attorney Mr. Cole (R. 9) and likewise was present at the pretended meeting on January 30, 1934 (R. 9, 10), and knew all the facts and is in no position to claim he was deceived.

In *Bruch* v. *Nat. Guarantee Credit Corporation* (Del.), 116 Atl. 738, the court held:

> "The board of directors of this corporation consisted of seven. * * * Three directors met at a special meeting. By resolution unanimously adopted these minority directors authorized the President of the corporation to file an answer in receivership cause instituted against it by complainant. There were four vacancies on the board. These vacancies could have been easily filled. * * * The fact is they filled no vacancies. * * * I am therefore of the opinion that there being no quorum of the board of directors at the meeting which assumed to authorize the filing of the answer in this case, the answer filed by the president is not the answer of the corporation."

In *Hotaling* v. *Hotaling* (Cal.) 224 Pac. 435, the court held:

> "Under the statute it required a majority of the board shall constitute a quorum. The articles provided that nine shall compose the Board of directors. Five met at a meeting, but one was interested because the deed to be executed was to transfer certain property of the corporation to one of the five directors present. By the resolution adopted by the remaining four the president and secretary were authorized to execute a deed of conveyance to Richard M. Hotaling, one of the members of the board present, of real estate belonging to the corporation. The deed was executed and recorded. The question of the validity and effect of the deed formed the subject-matter of this action. The trial court held that the deed was void and the appellate court affirmed the trial court's ruling, and in doing so used this language: * * * 'the deed under which Richard M. Hotaling claims as an attempted corporate act, it must, we think, be conceded to have been invalid from its inception for the reason that its execution was never effectively authorized by the Board of Directors of the corporation in whom was vested the sole power to give such authority.' We con-

clude that there was not a quorum of said directors capable of authorizing the execution of the deed, and that the grantees in such deed are estopped to claim any right or title to the property purported to be conveyed by such a deed."

The State Supreme Court in its opinion (R. 19) admits that one of the assignments of error raised by the appellant was that the trial court erred:

> "In holding that there ever was any legal consummation of the illegal transaction of Robert H. Strong, with the three trustees; in holding that the deed made in the name of appellant as grantor and Robert H. Strong, as grantee, on January 31, 1934, was a valid deed, and in not holding that it was a forged deed."

It is manifest under the foregoing showing, that a deed made in the name of appellant by persons who were never effectively authorized by the Board of Seven Trustees of the Twisp Company, in whom was vested the sole power to give such authority, did not constitute the genuine deed of the Twisp Company and of necessity then, it was a forged quit claim deed and the State Supreme Court manifestly erred in not so holding.

In *Almo Trust Co.* v. *Cunningham* (Tex.) 203 S. W. 1105, the court held:

> "Reliance on a recorded forged deed may bring loss on him who so relies, but it cannot affect the rights of the owner of the property. A man cannot be deprived of his property by a forged deed, no matter in what good faith the party acted who claims under it. The forged instrument is as absolutely void and ineffective as though it had never existed."

In *Lewis* v. *Kuyawa,* 158 Wash. 607, 617, 291 Pac. 1105, the court held:

> "It is unquestionably the general rule that one holding under a forged instrument, however ignorant he

may be of the forgery or how much of value he may have parted with in reliance on the genuineness of the instrument, cannot claim protection against the rightful owner. As some courts have said, it would be a monstrous doctrine to hold one, by forging a deed of his neighbor to himself could in any way affect the title of his neighbor."

CASES WHICH APPELLANT BELIEVES SUSTAIN THE JURISDICTION OF THE UNITED STATES SUPREME COURT ON THIS APPEAL ARE AS FOLLOWS:

In *Bryan* v. *Zimmerman,* 278 U. S. 63, 73 Law Ed. 184, this Court held:

> "There are various ways in which the validity of a state statute may be drawn in question on the grounds it is repugnant to the United States Constitution. No particular form of words or ph-ases is essential, but only that the claim of invalidity and the grounds therefore be brought to the attention of the State Court with fair precision in due time. And if the record as a whole shows either expressly or by clear intentment that this was presented. Of course, the decision must have been against the claim of invalidity, but it is not necessary that the ruling shall have been in direct terms. If the necessary effect of the judgment has been to deny the claim, that is enough."

The Fourteenth Amendment to the Constitution of the United States, reads as follows:

> "* * * No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws".

In *Mooney* v. *Holohan,* 294 U. S. 103, 79 Law Ed. 791, the court held:

"That Amendment governs any action of a State, whether through its legislature, through its courts, or through its executive or administrative officers."

In *Pothier* v. *Rodman,* 261 U. S. 307, 311, 67 Law Ed. 670, 672, this Court held that grounds for an appeal to the United States Supreme Court exists:

"In any case in which the Constitution or laws of a State is claimed to be repugnant or in contravention of the United States Constitution."

In *Milheim* v. *Moffat Tunnel District,* 262 U. S. 710, 717, 67 Law Ed. 1194, 1199, this Court held:

"The Federal question presented, being one which requires analysis and exposition for its decision, is not frivolous and the motion to dismiss the writ of error is accordingly denied."

In *Almo Lovell* v. *Griffin,* 343 U. S. 444, 453, 82 Law Ed. 949, this Court held:

"An objection to the validity of a municipal ordinance prohibiting the distribution, without permit, of circulars, handbooks, advertising, or literature of any kind, that such ordinance violated the Fifth and Fourteenth Amendment to the Federal Constitution by abridging the freedom of the press and prohibited the free exercise of petitioner's religion, and practice thereof by prohibiting the distribution of literature about the plaintiff's religion, in violation of the terms of the amendments, is sufficient. *Whether a Federal question was adequately presented and decided in the State Court is itself a Federal question."* (Italics ours.)

In *Lawrence* v. *Tax Commission,* 286 U. S. 276, 282, 76 Law Ed. 1102, 1106, this Court held:

"The Constitution, which guarantees rights and immunities to the citizen, likewise insures to him the privilege of having those rights and immunities judi-

cially declared and protected when such judicial action is properly invoked. Even though the claimed constitutional protection be denied on non-federal grounds, it is the province of this court to inquire whether the decision of the State Court rests upon a fair or substantial basis. If unsubstantial, constitutional obligations may not be thus denied."

In *Davis* v. *Wechsler*, 263 U. S. 22, 24, 68 Law Ed. 143, 145, this Court held:

"We are of the opinion that the judgment must be reversed. Whatever springs the state may set for those who are endeavoring to assert rights that the State confers, the assertion of Federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice. * * * The State Courts may deal with that as they think proper in local matters, but they cannot treat it as defeating a plain assertion of Federal right. The principle is general and necessary. Ward *v.* Love County, 253 U. S. 17, 22, 64 Law Ed. 751, 758, 40 Supt. Ct. Rep. 419. If the Constitution and laws of the United States are to be enforced, this court cannot accept as final the decision of the state tribunal as to what are the facts alleged to give rise to the right or to bar the assertion of it even under local grounds. * * * This is familiar as to the substantive law, and for the same reason it is necessary to see that local practice shall not be allowed to put unreasonable obsticles in the way."

In *Fiske* v. *Kansas*, 274 U. S. 380, 385, 71 Law Ed. 1108, this Court held:

"A decision of a State Court applying and enforcing a State statute of general scope against a particular transaction as to which there was a distinct and timely insistence that, if so applied, the statute was void under the Federal Constitution, necessarily affirms the validity of the statute as so applied, and the judgment is therefore, reviewable by writ of error under Section

237 of the Judicial Code. * * * And this Court will review the findings of fact by the State Court where a Federal right has been denied as to the result of a finding shown by the record to be without evidence to support it, or where a conclusion of law are so intermingled as to make it necessary, in order to pass upon the Federal question, to analyze the facts."

STATUS OF RECEIVER AND METHOW GOLD CORPORATION.

The "Receiver" was appointed by the Superior Court of Spokane County, under a Special Statutory Power of Section 3803-53, Para. 1, Subdivision (c), of the Uniform Business Corporation Act, Rem. Rev. Stat., (Supp.), of the State of Washington, which provides:

> "The Court may appoint a liquidating receiver or receivers (c) upon the filing of a petition for involuntary proceedings for dissolution, but only after process has been issued against the corporation and any other defendants named in the petition and after the filing of answers admitting the allegations of the petition, or after proof of such allegations if the same are not admitted" (R. 12).

And Section 3803-54, Para. 1, of Rem. Rev. Stat., (Supp.), further provides:

> "The receiver or receivers as provided in the last preceding section, shall, after giving such bond as the court may require for the faithful performance of his or their duties proceed with the liquidation of the affairs of the corporation in such manner as the court shall direct."

It appears, from Exhibit 57 (R. 12), being a certified copy of the proceedings in that receivership action brought in the Superior Court of Spokane County, State of Washington, on February 3, 1939, case entitled W. E. Gamble, plaintiff, v. Alder Group Mining & Smelting Company, and Rob-

ert S. Lewis and Fred B. Morrill, surviving members of the Board of Directors, defendants, case No. 102,961, that said defendants appeared and contested the appointment of a liquidating receiver on the grounds that said surviving members had on January 23, 1939, entered into a 99-year lease, of the lands in question herein, including the three patented mining claims, with Mahlon McCain and Chas. W. Gillespie, but the Alder Group Mining & Smelting Company had sold these three patented mining claims to John L. Magney, on an executory sale contract (Ex. 4) of date November 23, 1927, which contract was duly assigned to the Twisp Mining & Smelting Company, as vendee, on July 12, 1932. (R. 12) Mr. Gillespie admitted (St. 279):

> "I will admit I was associated with Mr. Morrill at the time and that Mr. Morrill showed me Judge Huneke's memorandum opinion."

Said Memo Opinion, dated March 31, 1939, provided:

> "The pleadings in this case show that the name of the defendant corporation was stricken from the rolls by the Secretary of State on July 1, 1922, for non-payment of its license fees and that three years later, viz., on July 1, 1925, this corporation was automatically dissolved under the law. Under Section 14, as above stated, it could be re-instated, however, at any time within ten years after July 1, 1925, but this was not done. We therefore have a defunct corporation, dead for more than 13 years, now answering that it has entered into a long time lease of its properties, which lease has been assigned to a third party which will work its properties and return profits to the company. And under the statute all the trustees of such corporation can do is to '*hold the title to property of such corporation for the benefit of its creditors and stockholders to be disposed of under appropriate court proceedings.*' *HENCE ANY AND ALL ACTIVITIES ALLEGED IN THE ANSWER MUST BE VOID.*" (Italics ours.)

And on May 18, 1939, the Receiver was appointed as a liquidating Receiver, by that Superior Court, under the power and authority of the above statutory provision and in doing so the court was acting under a limited jurisdiction and not as a court of general jurisdiction.

Fred B. Morrill then filed a claim for attorney fees for preparing and procuring the so-called lease and trial court denied his claim, and he appealed to the Supreme Court and this Receiver contested his claim in the Supreme Court in the case entitled W. E. Gamble, plaintiff, v. Alder Group Mining & Smelting Company et al., defendants. Fred B. Morrill, appellant, v. Seattle-First National Bank, Spokane & Eastern Division, as Receiver, Case No. 27981, 5 Wash. (2d) 578, 105 Pac. (2d) 811, and the Supreme Court held:

> "From the order appointing the receiver, no appeal was taken, and that order became final. * * *. The corporation, being in the condition it was, had no power to transact new business. * * *. Since it was the duty of the appellant and his associate director to refrain from engaging in any new business, it would seem evident that the appellant would not be entitled to compensation for doing something, which, under the law, it was his duty not to do."

And the record herein, shows: That a *Lis Pendens* of the Receivership action was filed in Okanogan County, State of Washington, on February 23, 1939, and further shows that the Methow Gold Corporation did not file the lease (Ex. 12) nor the assignment of same (Ex. 15) for record until March 8, 1939 (R. 11 & 12).

In *Ellis* v. *McCoy*, 99 Wash. 457, 169 Pac. 973, the court held:

> "He (appellant) calls attention to the concluding clause of the statute, the clause to the effect that a subsequent purchaser or encumbrancer is bound by the proceedings subsequent to the filing of the notice of

> pendancy of the action only to the extent he would have been bound if he was a party to the action, and argues that has he appeared and set up his claim, the court would have given judgment, not against him, but against the Roots only, and hence the judgment can have no more effect, inasmuch as he was not a party. But we cannot think this the meaning of the statute. *We think that he is bound by the judgment actually entered to the extent as if he was a party to the action.* The question therefore is not, would the court have entered a different judgment had he been a party to the action, but, to what extent would he have been bound by the judgment actually entered had he been such party."

The Methow Gold Corporation is therefore bound by the adjudication in the receivership action, that the lease (Ex. 12) and the assignment (Ex. 15) were void from their inception and since the Methow Gold Corporation alleged in its amended answer (Tr. 100) that it bases its rights under that void indenture of lease and assignment thereof, it has no standing in this case, other than a willful trespasser on appellant's lands.

In *Wapes* v. *Sergeant,* 120 Wash. 63, 206 Pac. 945, the court held:

> "When the corporation was formed, Sergeant undertook to assign to it this contract" (An executory sale contract) "and it obtained just such rights in this property as Sergeant had to give, and when the corporation went into the hand- of the receiver, the latter received just such rights in this property as the corporation had. If Sergeant was the owner of this contract, he would have the right, until such time as a forfeiture had been properly declared, to cut the timber, saw it into lumber, sell it and pay $3.00 per thousand feet from the sale price to these appellants, until the whole of the balance had been paid. *In our opinion, the receiver is not the unqualified owner of the property, and*

had no right to undertake to sell and convey an unencumbered unconditional title to it.''

Also see *State ex rel. Oatey Orchard Company* v. *Superior Court,* 154 Wash. 101 12, 280 Pac. 351, holding that the vendee in an executory sale contract of land has the exclusive possession of said land.

In *Ranson* v. *Williams,* 2 Wall 313, 17 Law ed. 803, that court held:

> ''The extent and nature of the power depends upon the terms in which it is conferred and it will not be enlarged because exercised by courts clothed with general jurisdiction; and any judgment by a tribunal without authority or which exceeds or lies beyond its authority is necessarily void and may be shown to be so in collateral proceedings even though it be a court of general jurisdiction, because no authority derived by law can transcend the source from which it came; and the principle that a limited authority must appear to have been strictly construed even when the acts of a Superior Court are in question, is well settled.''

In *Murry* v. *American Surety Co.,* 70 Fed. (9th C. C. A.) 341, the court in passing on the same question said:

> ''The fact that the superior court is a court of general jurisdiction did not give it power to appoint a receiver without any authority of statute under which it was acting. * * *. In whatever light this question may be viewed, we are brought directly face to face with the unquestionable rule of law in all special statutory proceedings the measure of the court's power is the statute itself.'' Also See, Valley, as Trustee *v.* N. F. & M. Ins. Co., 254 U. S. 348, 65 Law ed. 297.

This executory sale contract (Ex. 4) was assigned to the Twisp Company, prior to John Sawbridge's death. The Alder Group Mining & Smelting Company, vendor therein, had knowledge of that fact during the summer of 1932 and

the Receiver had knowledge of that fact from the records, where said contract was recorded on June 27, 1932 (R. 4). No forfeiture was ever claimed against the Twisp M. & S. Company (R. 4-5). All that the Receiver obtained to the Three Patented Mining Claims, was the right to enforce the terms of the executory sale contract, that was possessed by the Alder Group Mining & Smelting Company, but this Receiver unlawfully ignored the rights of the Twisp Company and wholly without power or authority entered into an illegal agreement with the Methow Gold Corporation on July 27, 1939, to prevent the Twisp Company from performing its executory sale contract and illegally gave the Methow Gold Corporation its consent to wilfully trespass on said lands that rightfully belonged to the Twisp Company (R. 11 to 13).

Under that illegal agreement, the Methow Gold Corporation mined ore, and removed ore from the premises and sold more than $350,000.00 worth of ore from the premises and has made no account for same and appellant is seeking an accounting from all the appellees for the ore unlawfully sold from said premises, which was mined, removed and sold without the consent of the Twisp Company. See *Fordney, as Executrix*, v. *King County*, 9 Wash. (2d) 557, 115 Pac. (2d) 667 (R. 11, 12).

The State Supreme Court was in error when it claimed the Twisp Company was estopped to question the illegal transactions of these appellees by reason of some claimed right for compensation for some expenditures they had made in order to proceed with their illegal undertaking, but this being an equitable action seeking an accounting from these illegal trespassers, there is no merit in the State Supreme Court's theory and this Court in *Guffy* v. *Smith*, 237 U. S. 101, 59 Law ed. 858, holds: That wilful trespassers are

not entitled to deductions like these appellees claim. Also see:

Pittsburgh, Etc. v. *Pentress, Etc.* (W. Va.) 100 S. E. 296.

Sweeney v. *Handley,* 126 Fed. (9th C. C. A.) 97.

We respectfully submit that this Court has jurisdiction of this appeal by virtue of the statutory provisions cited under heading "A" herein and the foregoing showing herein.

Respectfully submitted,

CLARENCE C. DILL,
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Attorneys for Appellant.

"APPENDIX TO STATEMENT AS TO JURISDICTION ON APPEAL."

IN THE

SUPREME COURT

OF THE

State of Washington

Appeal from the Judgment and Decree of the Superior Court of Okanogan County, State of Washington.

TWISP MINING & SMELTING COMPANY, a Corporation,
Appellant,

vs.

CHELAN MINING COMPANY, a Corporation; SEATTLE-FIRST NATIONAL BANK, acting through its Spokane & Eastern Branch, as Receiver of the Alder Group Mining & Smelting Company, a dissolved corporation, and Methow Gold Corporation,
Respondents.

No. 28798

SUPPLEMENTAL PETITION FOR REHEARING EN BANC

W. G. BOLAND,
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"APPENDIX AS TO STATEMENT AS TO JURISDICTION ON APPEAL"

I.

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SUPPLEMENTAL PETITION FOR REHEARING EN BANC

Comes now appellant, Twisp Mining & Smelting Company, and respectfully petitions the

court for a rehearing of this cause and a rehearing En Banc before the entire Supreme Court for the following reasons:

In our Petition for Rehearing which has been filed herein, we urged three main points as follows:

(1) The Departmental Opinion in holding that there was a quorum present in the meetings of January 17, 1934, and January 30, 1934, is wholly inconsistent with the Articles of Incorporation of the Twisp Company and of the statute.

(2) The Departmental Opinion in deciding that the Twisp Corporation is now estopped from urging the invalidity of the proceedings at that meeting and of the deed executed pursuant thereto, fails to take into account the true principles of estoppel and wholly ignores the facts as shown by the record.

(3) The Departmental Opinion ignores the fact that there was never any performance by

the Chelan Company of the things to be done by it in consideration for the alleged deed.

We shall discuss these points in their order.

I.

The Departmental decision substantially holds that the by-laws of a corporation are on a higher plane than the articles of incorporation themselves. In order to reach the conclusion that the Department did reach, it is necessary for them to give full force to a by-law that was entirely contradictory to and inconsistent with the articles of incorporation. This was done without any citation of authorities and without any discussion as to whether or not the two were inconsistent, and if this decision is allowed to stand, it will revolutionize corporation law in this State and create a situation where no stockholder of a corporation may rely on the articles of incorporation themselves for his protection, but on the contrary, he will be subject to the whim and caprice of any Board of Directors which may see fit to change or

alter the by-laws of the corporation from time to time. It is a matter of importance, far greater than this case itself. The case involves only the parties primarily interested therein, but the principle of law which the Department by its decision adopts, if followed to its logical conclusion, will nullify the effect of the charter or articles of incorporation of any company organized under the laws of this State. The members of a corporation have a constitutional right to rely on the charter of the company being given full force and effect. The United States Constitution guarantees them that right. It is true they may be amended by the procedure specified for that purpose, but they may not be amended by the legislature or by a court under the guise of judicial construction.

In *Bergman v. St. Paul Mut. Bldg. Assn.*, (Minn.) 13 N. W. 120, the court held:

> "The authority to pass by-laws is, as a matter of course, authority to pass such as are consistent with the articles of incorporation and not a power to subvert the

law of corporate existence." Also see Morewitz, Private Corporations, section 367, 368.

The Department in this instant case, construed, applied and enforced Article II, Section 6 of the by-laws of the Twisp Company, as a law, which superseded and nullified the provisions of the Uniform Business Corporation Act in regard to what constituted a legal quorum of a Board of Seven Trustees and as so construed, applied and enforced was repugnant to the Fourteenth Amendment of the Federal Constitution.

The portion of the articles of incorporation of appellant company necessary to this discussion is as follows:

> "ARTICLE V. The powers of the corporation shall be exercised through and its business shall be conducted by a Board of Seven Trustees; * * *"

The by-laws in so far as they affect the case, are as follows:

> "ARTICLE II. Section 1. The business and property of the company shall be man-

aged and controlled by a board of not less than three nor more than seven trustees, who must be stockholders of the company, and who shall be elected annually by ballot at the annual meeting of the stockholders and shall hold office for one year and until their successors are elected and qualified. The trustees shall act only as a board, and the individual trustee shall have no power as such.

"Section 6. *Quorum.* A majority of the Board of Trustees, for the time being in office, shall constitute a quorum for the transaction of business, but, if at any meeting of the Board there shall be less than a quorum present, a majority of those present may adjourn the meeting from time to time until a quorum shall be present."

The statute in force at the time is found in Remington's Revised Statutes 3803-31, Para. 3 (Supp.) as follows:

"3. The number, qualifications, terms of office, manner of election, time and place of meeting, and the powers and duties of the directors may, subject to the provisions of this act, be prescribed by the articles or by-laws. Except as otherwise prescribed in the articles or by-laws:

d. a majority of the board of directors shall be necessary to constitute a quorum for the transaction of business, and the acts of a majority of the directors present at a meeting at which a quorum is present shall be the acts of the board of directors.

e. the board of directors may, by resolution passed by a majority of the whole board, designate two or more of their number to constitute an executive committee, who, to the extent provided in said resolution, shall have and exercise the authority of the board of directors in the management of the business of the corporation."

Now it must be perfectly clear that Section 1 of the by-laws is entirely inconsistent with the articles of incorporation. The very charter of the corporation itself provides that the business of the company *shall* be exercised through and its business *shall* be conducted by a board of seven trustees. The question of law presented is whether the charter or by-laws shall prevail. The Department apparently held that both were in full force and effect. The opinion does not discuss the question as to whether the two were inconsistent. It was passed over without the

citation of any authority and without even considering the cases cited in appellant's brief which lays down the rule that in order to be binding at all, a by-law must be consistent with the charter of the company.

Was it the thought of the writer of the opinion that the charter of the company and the by-laws were consistent? Was it the opinion of the Department that if the by-laws were inconsistent with the charter, that the by-laws would prevail? We do not know which of these positions was adopted by the Department, but one or the other, or both, must have been answered in the affirmative in order to reach the conclusion that the Department did that the meeting of the Twisp Company held on January 30, 1934, was a legal meeting at which a quorum was present.

9

WERE THE TWO PROVISIONS INCONSISTENT?

It seems to us too clear for argument that the by-law as construed, applied and enforced by the Department is not consistent with the charter or section 2803-31, Para. 3, Subd. (d) of Rem. Rev. Stat. (Supp.). If the business of the corporation must be conducted by its board of seven trustees, how can it be said that the board can consist of from three to seven trustees? The answer is obvious. We do not believe, therefore, that it could have been the intention of the Department to hold that these two provisions could be consistent.

IF THE TWO PROVISIONS ARE INCONSISTENT, CAN THE BY-LAW PREVAIL OVER THE CHARTER?

If it were the opinion of the Department that the directors or trustees may make a by-law which entirely changes the charter, we submit that it is contrary to all of the authorities, and

contrary to all conception of corporate law which has heretofore been had. It is especially provided that there is no way to amend the articles of incorporation, except in the method provided by statute, and that is not by making a by-law inconsistent with the charter. It is clear from the Uniform Business Corporations Act that once the articles of incorporation have been filed, they are controlling, and that no by-law can be made either by the shareholders or by the board of directors where it is in any way inconsistent with law or with the articles of incorporation. Remington's Revised Statutes, Section 3803-26 (Supp.):

> "1. The shareholders of a corporation may make and alter by-laws not inconsistent with law or the articles of incorporation.
>
> 2. The authority to make by-laws may be expressly vested by the articles of incorporation in the board of directors subject to the power of the shareholders to change or repeal such by-laws.
>
> 3. The board of directors shall not make or alter any by-laws fixing their qualifica-

tions, classifications, term of office or compensation."

All of the authorities lay down the same rule. It is a well-settled principal that all by-laws which are inconsistent with the charter or with the governing law are void. 13 Am. Jur. 286, Section 156.

Fletcher Cyc. on Corporations (Permanent Ed.) vol. 8, p. 723, Section 4190, provides:

> "By-laws, to be valid, must be consistent with the terms and spirit of the charter of the corporation—the word 'charter' being here used in its broadest sense without regard to whether the statutory rights to be a corporation is obtained by a special act or a general statute. A by-law which is not consistent with the charter, but in conflict with and repugnant to it is void."

We submit that the by-law which seeks to permit the doing of corporation business by a board of trustees from three to seven, is entirely inconsistent with the articles of incorporation and is void.

If we are correct in this contention, then at the time the crucial meeting was held, the whole board of trustees of the Twisp Company had to consist of seven members, and the statute in force at the time states precisely what is necessary to have a quorum, where it is said:

> "d. a majority of the board of directors shall be necessary to constitute a quorum for the transaction of business, and the acts of a majority of the directors present at a meeting at which a quorum is present shall be the acts of the board of directors."

Under the charter which controlled, the board of directors could not consist of less than seven and a majority of that board could not be less than four. There might be a vacancy in office, there might be less than seven trustees actually qualified at any one time, but under the charter of the corporation and under the statute in force at that time, it took four directors who are actually present at a meeting to do any business whatever.

Section 6, Article II of the By-Laws as con-

strued, applied and enforced, does not help the Departmental Opinion. It is just as inconsistent with the articles of incorporation as is Section 1 of Article II. Under the articles, the required trustees in office at any time were seven. It is true that Section 1 of Article 2 of the by-laws made a different provision, but as we have shown, that section is inconsistent with the charter and void, and so is Article 2, Section 6 inconsistent and void if it means that there could be a board of trustees of less than seven, and if it means that less than four trustees could transact business.

In re Arcadia Dairies, Inc., (Del.) 135 Atl. 846, 848, the court held:

> "The first grounds upon which the general validity of the claim is attacked is that the director's meeting which authorized the bonds secured by a mortgage was an invalid one in that only one director was present in person, the other two being represented by proxy. All action taken at that meeting, it is contended was void. This is true, because directors of a corporation cannot act by proxy."

We were not present when the by-laws were adopted, but it is a safe guess that what happened is this: the articles were drawn and as is often the case, the by-laws were copied from an old set, or from a form which the attorney who prepared the papers had in his possession, and it was not noticed that this particular portion of the by-laws was inappropriate for use under the particular articles which were filed with the Secretary of State. Article 2, Section 6 of the by-laws is also inconsistent with the statute. The statute is definite in its provisions.

> "A majority of the board of directors shall be necessary to constitute a quorum for the transaction of business." Rem. Rev. Stat. 3903-31, Para. 3, Subd. "D."

It does not say a majority of the Board of Trustees *for the time being in office.* If that had been the intention of the legislature, it would have incorporated it in the statute. In other words, the articles of incorporation definitely determine the number of trustees of the corporation and the statute determines what is

necessary to constitute a quorum of those trustees, and any by-law inconsistent with the statute is of necessity void. Fletcher's Cyclopedia on Corporations (Permanent Ed.) Vol. 5, p. 69, Section 3013, provides:

> "A by-law providing what shall constitute a quorum is invalid if it conflicts with the provisions of a statute on the subject, and yields to the statute. * * *."

In *Gentry-Futch Co. v. Gentry* (Florida) 106 So. 473, the court held:

> "In support of the decree in the court below holding the meeting of October 18 void, it is contended by the appellee, Gentry, that there was not sufficient stock legally represented at the meeting to represent a quorum, that is, that at most only 50 or 51 per cent of the stock was represented at the meeting, *whereas the by-laws of the corporation provided that no business should be transacted at any meeting without there being 75 per cent of the stock represented.* This provision of the by-law is void, being in conflict with section 4082 of the Revised General Statutes of 1920, which reads: 'A majority of the stock shall constitute a quorum at stockholders' meet-

> ings.' This announces a general statutory policy and principal, which, of course, cannot be changed by a corporate by-law." (Italics ours)

In *Bruch v. National Guarantee Credit Corporation* (Del.) 116 Atl. 738, the court passed on this precise question, saying:

> "The board of directors of this corporation consisted of seven. * * * Three directors met at a special meeting. By resolution unanimously adopted these minority directors authorized the President of the corporation to file an answer in receivership cause instituted against it by complainant. There were four vacancies on the board. Those vacancies could have been easily filled. * * * The fact is they filled no vacancies. * * * I am therefore of the opinion that there being no quorum of the board of directors at the meeting which assumed to authorize the filing of the answer in this case, the answer filed by the President is not the answer of the corporation."

There can be no question but that the meeting of January 17, 1934, and the meeting of January 30, 1934, were not legal meetings un-

der the charter and under the statute. In neither meeting was a quorum present. The mere fact that Mr. Cull who at that time was a trustee and officer of the Chelan Company, for which the deed was procured by Mr. Strong, advised those present that five trustees only were necessary for the corporation, did not make it a fact. The quorum was not present. The three members constituted a minority of the Board of Directors as fixed by the charter of the corporation, and the statute expressly provides that a minority cannot constitute a quorum. It follows that the purported acts of the board of directors at these meetings was not the act of the corporation at all and that the resolution passed at said meetings did not legally authorize the execution of the deed. It makes no difference whether you call the deed a forged deed or a deed made without authority. In either event, it had no validity. We submit that the Department in holding the meeting of January 30, 1934, to be a legal meetings, clearly failed to grasp the fact that the by-laws relied on by it were entirely inconsistent with the char-

ter and that it was also inconsistent with the statute, and in justice, not only to the appellant, but to all persons holding corporate stock, the question should be submitted to the court en banc for further consideration.

The Departmental Opinion is squarely contradicted by the Supreme Court of California, in *Hotaling v. Hotaling*, 224 Pac. 435, where that court held:

> "Under the statute it required a majority of the board shall constitute a quorum. The articles provided that nine shall compose the board of directors. Five met at the meeting, but one was interested because the deed to be executed was to transfer certain property of the corporation to one of the five directors present. By the resolution adopted by the remaining four the president and secretary were authorized to execute a deed of conveyance to Richard M. Hotaling, one of the members of the board present, of real estate belonging to the corporation. The deed was executed and recorded. The question of the validity and effect of the deed formed the subject-matter of this action. The trial court held that the deed was void and the appellate

court affirmed the trial court's ruling, and in doing so used this language: * * * 'the deed under which Richard M. Hotaling claims as an attempted corporate act, it must, we think, be conceded to have been invalid from its inception for the reason that its execution was never effectively authorized by the Board of Directors of the corporation in whom was vested the *sole power to give such authority.*' We conclude that there was not a quorum of said directors capable of authorizing the execution of the deed, and that the grantees in such deed are estopped to claim any right or title to the property purported to be conveyed by such a deed." (Italics ours)

Also in *Enright, as Trustee in Bankruptcy v. Heeksher,* 240 Fed. (2d) (C. C. A.) 963, that same question was passed upon and the court held:

"It seems from the minutes that there were five directors present, but Mr. Munford was interested in this transaction, and left the room or retired while the directors were considering this proposition, and was not present when it was acted upon. Of course, it would constitute a quorum if he was there, even though he did not vote; but if he left the room, so as to leave only four

directors present, and five was required, it seems clear there would have been no meeting at the time the action was taken, therefore there could be no finding by the directors, as required by section 49 of the Corporation Act or Law, that the value of the property transferred was equal to the value of the stock issued. The resolution was held to be a nullity."

The decision of the Department gives an interpretation to Section 6, Article 2 of the by-laws, which provides a majority of the board of directors *for the time being in office,* shall constitute a quorum for the transaction of business, that was obviously never intended. To properly construe the by-laws, they must be read together and when so read, it is perfectly apparent that this section refers to the Section 1, Article 2, where it is provided that the directors may be from three to seven in number. If that were permitted by the charter of the corporation, there would be some logic in so construing it, but when you take the actual facts in the case at bar, where the charter itself required seven trustees and read into this by-law

a meaning that would permit a majority of trustees who happened to then be in existence to transact business for it, you might have a situation where only one trustee would be left and he would, according to the Department's opinion, be fully qualified to run the corporation. He could decide as Mr. Cull did, that he didn't need any more trustees and could proceed to bind the corporation to anything that he might desire until someone in authority might call a stockholders' meeting to elect more trustees. Naturally, one person in authority would not desire to fill the Board where he could do as he liked without hindrance. It is obvious to us that when these two sections of the by-laws are read in conjunction with the charter and in conjunction with the statute in force at the time, it must be held that the Department has given the construction to the by-law, Section 6, Article 2, that is not only out of harmony with good sound public policy, but is also entirely contrary as to what was ever intended by the people who formed the corporation.

II.

THERE WAS NO ESTOPPEL

The Departmental Opinion, after holding that there was a quorum present at the meeting of January 30, 1934, goes on to further assert that even if that meeting were not a valid meeting, appellant is estopped to question the rights of respondents. In so holding, it seems to us that the Department has entirely ignored one of the principal elements of estoppel. The necessary elements of an equitable estoppel are set forth in 21 C. J., at p. 1119, Estoppel, Para. 122, as follows:

> "Essential Elements—a. In General. In order to constitute this kind of estoppel *there must exist a false representation or concealment of material facts;* it must have been made with knowledge, actual or constructive, of the facts; the party to whom it was made must have been without knowledge or the means of knowledge of the real facts; it must have been made with the intention that it should be acted upon; and the party to whom it was made must have relied on or acted upon it to his prejudice. To constitute an 'estoppel in pais' there

must concur an admission, statement, or act inconsistent with the claim afterward asserted, action by the other party thereon and injury to such party. There can be no estoppel if either of these elements are wanting. They are each of equal importance." (Italics ours)

All of these elements must concur to create an equitable estoppel. We call attention to the very first one. In order to constitute this kind of estoppel, there must exist a false representation or a concealment of material facts. Now, what misrepresentation was made to Mr. Strong in this deal? What misrepresentation was made by the Twisp Company to the Chelan Company? There is nothing whatever in the record (Minutes of those meetings in January, 1934, Exhibit No. 7 herein) that shows that there was any misrepresentations or any concealment of an existing fact, by the Twisp Company or any authorized officer or agent of the Twisp Company. The most that could be said is that Mr. Cull, a director and assistant secretary of the Chelan Company represented that the meet-

ing at which the deed was authorized was a valid and legal meeting, but it must be remembered that both Mr. Strong and Mr. Cull were present at that meeting, and also that Mr. Cole, the personal attorney for Mr. Strong, was also present, and each of these gentlemen had full knowledge of the requirements of the articles of incorporation of the Twisp Company, and they had knowledge of its by-laws for the question which is raised here came up at that meeting, and it was decided that at the first meeting, there was not a quorum present.

It is perfectly apparent that the by-laws and the charter were examined and that they all determined that a further meeting was necessary and at that meeting, that the question of the necessary number of trustees was openly discussed, and it was decided that five trustees were all that were necessary, but that decision was made by Mr. Cull, the attorney and assistant secretary, and a trustee for the Chelan Company. Mr. Cull alone, of all persons, knew all about the existing facts pertaining to the organ-

ization of the Twisp Company and of the facts and the making of its by-laws, and all of its corporation papers were apparently in his possession. Whatever Mr. Strong took and whatever the Chelan Company took, were taken with full knowledge of all of the facts and things which were done at these meetings and with full knowledge of all of the facts which might effect the legality of the acts done at the meeting.

Appellant is now claiming that the meeting at which the Twisp Company's deed was authorized, was an illegal meeting, and is urging it on facts which were fully submitted to the Chelan Company and its officers and attorney at the time the transaction took place.

In 19 C. J., Secundum, p. 483, Section 1011, the following rule is laid down:

> "In order to bind a corporation on the grounds of estoppel there must have been some act or conduct on its part, through its authorized officers or agents, which amounts to a representation that the person assuming to act for it in a particular transaction has authority to do so, and which was de-

> signed to injure another party, who is ignorant of the truth and of his own rights, and who relied on the faith of such acts and declarations, and was misled to believe in the authority of such person to his subsequent injury; * * *."

Under this rule, there was no act of this corporation, through its authorized officers or agents for the very simple reason that none of the officers or agents could be authorized to perform any act at a meeting at which a quorum was not present. We must keep in mind, of course, that three trustees of the Chelan Company and Mr. Strong, its president, were present at this meeting, and its assistant secretaries and attorney were there and knew that a quorum was not present. Many authorities might be cited on the question of what is necessary in order to create an estoppel, and there are many cases decided by our own court, but none of them differ from the general rule herein set forth, and it would serve no good purpose in this argument to multiply authorities.

In the Departmental Opinion, the inference

is made that John Magney and Roy Magney, who now control the Twisp Company, knew of these meetings of January 17 and January 30, 1934, and of all the transactions with reference to this property thereafter, and stood by without objection for a period of five years. The record, it seems to us, is entirely to the contrary. It must be conceded that Mr. Cull is adverse to the appellants in this case and yet Mr. Cull testified as follows:

> "Q. Did you personally, or did any of the directors of the Company personally in your presence, ever discuss this Strong deal with the Magneys?
>
> A. No, I will confess I don't know they ever knew anything about it; they didn't have any opportunity to." (St. 80)

Now, if Mr. Cull had the books and records of the corporation, and Roy Magney and John Magney had not examined them, and if in his opinion, they had no means of knowing the transaction which had taken place, how does the court without evidence, determine that they did know? Naturally, these directors who put the

deal through, knew that it was against the wishes of appellants and it is quite natural that they would not advise him of what had been done. The corporation itself was dormant during that period. Roy and John Magney were a large part of the time in Colorado. We feel that the inference left by the Departmental Opinion, is not supported by the record, and that this case should be re-argued so that the whole court may have the advantage of such re-argument and may ascertain the actual facts as they were presented before the lower court. We feel that the briefs of appellant could not have made the facts as clear to the Department as they should have been made, and that the client should have the right to have the case decided with all of the facts called specifically to the attention of the court.

III.

THE CHELAN COMPANY DID NOT PERFORM ITS CONTRACT

We need not go further on the question of estoppel, but in justice to our client, we are required to state that the Department was entirely wrong in holding that the Chelan Company or Mr. Strong had performed its part of the proposed deal or that it had paid the consideration for the transfer. The Department opinion states, in Washington Devisions, No. 4, page 243, as follows:

> "Mr. Strong formed the Chelan Mining Company, pursuant to his agreement with Twisp; and, after the conveyance by Mr. Strong and wife to Chelan Mining Company, that Company issued to Twisp 250,000 shares of its stock, which were delivered to Mr. Cull and receipted for by him. Twisp still holds this stock."

Now, the record shows that 250,000 shares of stock were issued by the Chelan Company, and that they were held by Mr. Cull who was the Chelan Company's assistant secretary and at-

torney (St. 55 and 56), and that this certificate was held until April 5, 1939, and then was offered to the Twisp Company and it was refused. Mr. Cull at the time of the issuance of this certificate was not an officer of the Twisp Company and was not in sympathy with appellants, and we feel that the statement made by the Department that the Twisp Company still holds this stock, does violence to the record. It was never offered to it until proceedings were started to institute the present action. While the suggestion is made that the Chelan Company proceeded to pay off and settle claims against the property, these claims were not paid from any money advanced by Chelan Company or by Mr. Strong. The record shows that the Twisp Company's own personal property was used to settle what claims were settled (St. 302). The record further shows that the Chelan Company did no assessment work (St. 231). If any money was advanced by the Chelan Company to pay claims or liens, or if it was out anything, the outlay was made by the company with full knowledge of the facts

surrounding the issuance of the deed, and it was not in any way misled.

In *Lammer v. Arkansas Power & Light Company* (Ark.) 116 S. W. (2d) 361, the court held:

> "Where the party knew that the agent or officer had no authority to make the contract, and even though the corporation knew that the purchaser was expending considerable money in making preparations to receive the power, yet it would not estop the company from denying the existence of the alleged contract."

Likewise in *T. P. Ranch Co. v. Gueydan and Riley* (La.) 87 So. 234, the court held:

> "Where the lessee knew that the lease was not authorized by the lessor corporation because entered into by only two of the three directors, the silence of the directors, including the third director, as to the invalidity of the lease, did not estop the corporation on the grounds of acquiescence from denying the validity of the lease, since silence did not put the lessees in any worse position than they already occupied."

In Volume 116, Wash. Dec., at page 234, the

statement is made in substance that the contract under which the Twisp Company claims (Ex. 4) was forfeited in an action brought by Mr. Morrill on August 24, 1932. It is conceded that the Twisp Company was not made a party to this proceeding. The contract which John Magney had originally received, had been assigned by him to the Alder Development Company, and it in turn had assigned the contract to the Twisp Company. At the time the action was brought by Mr. Morrill, neither Mr. Magney, nor the Alder Development Company, nor the Alder Metals Corporation had any interest in the contract. This action was of no importance as far as the Twisp Company was concerned, since it was not made a party, unless its interest was not known to the persons who brought the action and unless its assignment was not recorded at the time the action was brought, and the Department opinion goes on to state "Mr. Morrill stated that at the time he started the above action, there was nothing of record showing that the Twisp Company had or claimed any interest

in the property." But the writer of the opinion entirely ignores the definite proof that the assignment was recorded in Book 9 of Miscellaneous Records at page 307, on June 27, 1932, in the office of the Auditor of Okanogan County, Washington (St. 10). This testimony came from the County Auditor of Okanogan County, and he had the record book in his hands at the time the testimony was given, and all counsel conceded that the assignment was so recorded. We are at a loss to know why the writer of the Departmental Opinion overlooked the definite proof on this question from the County record itself and emphasized in his opinion a bare statement of Mr. Morrill who was in no sense the custodian of the County records and apparently had made no careful investigation to see what was recorded and what was not and the Department further ignored the record (St. 282-285 and Supplemental Record).

IV.

RESPONDENTS ARE NOT GOOD FAITH PURCHASERS

It is clear from the record, that the Receiver and Methow Gold Corporation, respondents, derived their claimed rights in this action from a "Quit Claim Deed" from the Chelan Mining Company, as vendor, of date of January 17, 1939.

In *Reynolds v. Moseley,* 32 Fed. (2d) (8th C. C. A.) 979, holds:

> "The law is well settled that one cannot be deemed an innocent purchaser of an interest in real property, who buys with knowledge of an outstanding title or of outstanding rights superior to his own; and knowledge of facts sufficient to put a reasonable prudent man upon inquiry, which if followed up with reasonable diligence, would lead to the knowledge of such outstanding title or rights, is equivalent to knowledge of the outstanding title or outstanding rights, thereunder."

An this court in *Jones v. Berg,* 105 Wash. 69, 177 Pac. 712, holds:

> "If she, the vendee, in a quitclaim deed,

chose to take a quitclaim deed from the owner, * * *, it is plain to us that she got no better title than the vendor possessed, * * *."

The Chelan Mining Company, as shown herein, having no right, title or interest to convey, the Receiver and the Methow Gold Corporation obtained no adverse claim to appellant's rights, and cannot be deemed innocent purchasers without notice of the invalidity of the Chelan Mining Company's claimed rights.

We feel that we have shown that the Department was in error in all of the three particulars to which we have called attention, and we feel that we have shown also that due to the great length of the record, all of the matters which should have been called to the attention of the court have not been properly called to its attention, and in order that justice be done, it is essential that a rehearing be had before the whole court.

Respectfully submitted,

W. G. BOLAND,
E. A. CORNELIUS,
Attorneys for Appellant.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 213

TWISP MINING & SMELTING COMPANY, A CORPORATION,

Appellant,

vs.

CHELAN MINING COMPANY, A CORPORATION; SEATTLE FIRST NATIONAL BANK, ACTING AS RECEIVER OF THE ALDER GROUP MINING & SMELTING COMPANY, A DEFUNCT CORPORATION; AND METHOW GOLD CORPORATION, A CORPORATION,

Appellees.

ADDITIONAL AUTHORITIES IN SUPPORT OF THE JURISDICTION OF THIS COURT OF THIS APPEAL, WITH COMMENTS.

In *Dahnke-Walker Milling Co.* v. *Bondurant,* 257 U. S. 282, 66 Law Ed. 239, at 242, this Court held:

> "In the state court the plaintiff did not simply claim a right or immunity under the Constitution of the United States, but insisted that, as to the transaction in

> question, the Kentucky Statute was void, and therefore unenforceable, because in conflict with the commerce clause of the Constitution. The court did not accede to the insistence, but applied and enforced the statute. Of course, that was an affirmance of its validity when so applied. * * *. That the statute was not claimed to be invalid in toto and for every purpose does not matter. A statute may be invalid as applied to one state of facts, and yet valid as applied to another. * * *. The provisions quoted from the jurisdictional section show that in cases where the validity of a state statute is drawn in question because of alleged repugnance to the Constitution, the mode of review depends on the way in which the state court resolves the question. *If it be resolved in favor of the validity of the statute, the review may be on writ of error, and if it be resolved against the validity, the review can only be by writ of certiorari.* The provisions take no account of the particular grounds or reasons upon which the decision is put." (Italics ours.)

Section 3803-11, Para. 1, of Rem. Rev. Statutes (Sup.) of the Uniform Business Corporation Act of the State of Washington went into full force and effect on January 1, 1934, and expressly provided:

> "A corporation which has been formed under this act, or a corporation which existed at the time this act took effect, shall have the capacity to act possessed by natural persons, *but such a corporation shall have authority to perform only such acts as are necessary or proper to accomplish its purpose and which are not repugnant to law.*" (Italics ours.)

Section 3803-26, Para. 1, of Rem. Rev. Stat. (Sup.), provides:

> "1. The shareholders of a corporation may make and alter by-laws not inconsistent with law and the articles of incorporation."

and Article V of the Articles on Incorporation of the appellant, Twisp Mining & Smelting Company, provides:

> "The powers of the corporation shall be exercised and its business shall be conducted by a Board of Seven Trustees."

and Section 3803-31, Para. 3, Subd. (d) of Rem. Rev. Stat. (Sup.), provides:

> "A majority of the board of directors shall be necessary to constitute a quorum for the transaction of business, and the acts of a majority of the directors present at a meeting at which a quorum is present shall be the acts of the board of directors."

The trial court and the State Supreme Court in this instant case were faced with the fact, that the Articles of Incorporation of the Twisp Mining & Smelting Company fixed its Board of Trustees, as a Board of Seven Trustees and therefore the law as applied to this corporation provided that there must be four trustees actually present at any meeting of that Board of Seven Trustees to legally transact any business of any kind of the Twisp Mining & Smelting Company.

The statute under the provisions of Section 3803-11. Para. 1, of Rem. Rev. Stat. (Sup.), of the Uniform Business Corporation Act, expressly provided that the Corporation had no power or authority to perform any act which was repugnant to law. Of necessity then, the Corporation had no power to enact any By-Law which was inconsistent with the Articles of Incorporation or the provisions of Section 3803-31, Para. Subd. (d), of Rem. Rev. Stat. (Sup.), of the Uniform Business Corporation Act.

Article 2, Sec. 6, of the By-Laws in question in this instant case provides:

> "A majority of the Board of Trustees, for the time being in office, shall constitute a quorum for the trans-

> action of business, but, if at any meeting of the Board there shall be less than a quorum present, a majority of those present may adjourn the meeting from time to time until a quorum be present."

It appears from this record that the Chelan Mining Company was organized on January 26, 1934, and that Robert H. Strong, James Cole and James O. Cull, became directors of that corporation, and on January 29, 1934, Robert H. Strong was elected its president and James Cole and James O. Cull were elected its assistant secretaries, and these three gentlemen were present at the purported special trustees meeting of the Board of Seven Trustes of the Twisp Mining & Smelting Company of date of January 30, 1934 (R. 7, 8 & 9).

It further appears from this record that James O. Cull, a director and assistant secretary of the Chelan Mining Company, advised Mr. Strong, Mr. Cole, and the three minority trustees present at that purported special meeting of the Board of Seven Trustees that the Board of Trustees of the Twisp Mining & Smelting Company at that time consisted of Seven Trustees but that there were two vacancies on the Board of Seven Trustees at that time (R. 10), and the record further shows that Mr. Cull construed the By-Law heretofore quoted herein to mean that:

> "A majority of the trustees then in office, constituted a quorum, and that the three minority trustees of the then Board of Seven Trustees could legally proceed to transact the business of the Twisp Mining & Smelting Company" (R. 10).

The State Supreme Court stated in its opinion (R. 18 & 19), that the Twisp Mining & Smelting Company, made the following assignment of errors on its appeal from the Judgment and Decree of the trial court, to-wit:

> "The trial court erred in holding that three members of a board of seven trustees, at an informal gather-

ing, legally represented the appellant; in holding in substance that those three trustees had power and authority to appoint an assistant secretary; in holding there was any by-law of appellant which in any way prescribed something different from that which is in the statute in regard to what constitutes a quorum; in assuming there was a legal special meeting of the board of seven trustees held on January 30, 1934; in further holding that those three trustees had any power or authority to pass a resolution of any kind which would be binding on appellant, and in not holding that the acts of those three trustees were ultra vires and absolutely void from their inception; and in holding that there ever was any legal consummation of the illegal transaction of Robert H. Strong with the three trustees; in holding that the deed made in the name of appellant as grantor and Robert H. Strong, as grantee, on January 31, 1934, was a valid deed, and in not holding that it was a forged deed; * * *."

and the State Supreme Court in its opinion further states:

> "It is true the articles do provide the powers of the corporation shall be exercised through a board of seven trustees. It is also true that the articles do not say how many trustees shall constitute a quorum to transact business. However section 6, of article 2, of the by-laws, provides that a majority of the board of trustees, for the time being in office, shall constitute a quorum for the transaction of business, unless such by-law was in conflict with Rem. Rev. Stat. (Sup.) Section 3803-31, paragraph 111" (R. 36).

The State Supreme Court, in adopting that view, overlooked the fact that the Articles of Incorporation prescribed a Board of Seven Trustees, and that the statute provided that there must be a majority of that board, or four trustees, to constitute a quorum to transact business. There could not be a different board prescribed by any

By-Law for that is inconsistent with the Articles of Incorporation and law on the subject.

The State Supreme Court further states in its opinion:

> "It seems to us perfectly plausible and reasonable that a situation such as here presented was contemplated at the time the by-laws were passed. The next reference to Fletcher's Cyc. of Corporations is vol. 2, page 206, sec. 421, from which appellant quotes" (R. 37 & 38).

Fletcher's Cyc., on Corporations, Vol. 2, page 206, Section 421, provides:

> "The general * * * rule being the number necessary to constitute a quorum under a by-law which provides that a majority of the directors shall be necessary and sufficient to constitute a quorum, is the majority of the entire board, notwithstanding there may be vacancies at the time." Hotaling *v.* Hotaling (Cal.) 224 Pac. 435, then the State Supreme Court further stated:
>
> "This quotation is not applicable here, for the reason that it covers a situation where the by-laws provide "That a majority of the directors shall be necessary and sufficient to constitute a quorum," *not a majority of the trustees then in office, as in the instant case*" (R. 38). (Italics ours.)

Again the State Supreme Court overlooked the undisputable fact, that the Articles of Incorporation provided for the Board of Seven Trustees. Since the statute provided that a quorum must be present to do business there must be at least four trustees present to constitute a quorum, and under Section 3803-11, Para. 1, *supra*, the corporation had no power or authority to pass any by-law that was repugnant to law, and Section 3803-37, Section 3803-38 of Rem. Rev. Stat., (Sup.), of the Uniform Business Corporation Act provides that the Articles of Incorporation can only be amended by a resolution of the stock-

holders after that resolution is duly filed with the Secretary of State and a certificate of amendment issued by the Secretary of State. That was not done in this instant case. See, *in re Dolgeville,* 160 N. Y. 500, 55 N. E. 287, where that question was passed upon, and the court held:

> "The statutory provisions regulating the increase or decrease of directors of a corporation required the calling of a meeting of the stockholders, and authorized the determination of the question by a vote of those owning a majority of the stock and provided that "The proceedings of such meeting shall be entered in the minutes of the corporation and a transcript thereof, verified by the president and secretary of the meeting, shall be filed in the office where the original certificate of incorporation were filed." After careful examination of the origin and history of the statute, and due consideration of the object which the legislature aimed to accomplish by the several steps which it required shall be taken to effectuate an increase or reduction in the number of directors, we have concluded that it must be held that the number of directors of the Dolgeville Electric Light & Power Company was not reduced until after the filing of the transcript of the minutes of the corporation with the Secretary of State and the County Clerk, and as that was not done until after these proceedings were instituted it follows that the petition presented to the Court was not signed by a majority of the directors, and therefore the Court was without jurisdiction to make any order in the premises."

It is clear then, that the controlling authority of Article 2, Section 6, of the By-Laws was in violation of the Uniform Business Corporation Act and that the decision made based upon said violation of the State law deprived the stockholders of their property without due process of law. This is repugnant to the provisions of the 14th Amendment of the Constitution of the United States.

That construction placed the By-Law on a higher level than the Articles of Incorporation and law governing this instant case, and deprived the appellant corporation and its stockholders of their property and property rights without due process of law within the meaning of the 14th Amendment to the Constitution of the United States.

In other words, the State Supreme Court assumed legislative power to repeal the provisions of the Uniform Business Corporation Act, by giving authority to a By-Law providing that a majority of the trustees then in office shall constitute a quorum for the transaction of business of the appellant corporation in excess of its power so to do, and its act in so doing was repugnant to the provisions of the 14th Amendment to the Constitution of the United States and resulted in depriving the stockholders of the appellant corporation of their property and property rights without due process of law within the meaning of the 14th Amendment to the Constitution of the United States and of the equal protection of the provisions of the Uniform Business Corporation Act of the State of Washington.

Section 3803-11, Para. 1, of Rem. Rev. Stat., (Sup.), expressly provides that no corporation of the State of Washington has any power or authority to perform any act which is repugnant to law, and when the Articles of Incorporation fixed the number of the Board of Trustees of the appellant corporation and the law fixed that there shall be a majority of the Board present to constitute a quorum to do business, it means that the entire Board of Seven Trustees must be present to transact any business of the Twisp Mining & Smelting Company. This corporation, by the law under which it obtained its charter, had no power or authority to pass any by-law that was in conflict or inconsistent with its Articles of Incorporation and Section 3803-31, Para. 3, subd. (d) of the Uniform Business Corporation Act, and the attempt to do an act in excess of the

corporate power constituted an *ultra vires* act under the authority of *Central Trans. Co.* v. *Pullman Car Co.*, 139 U. S. 24, 35 Law ed. 55, and therefore the attempted transaction of Chelan Mining Company, a corporation, with the minority trustees was absolutely null and void from its inception.

It is manifest, when one stops to think, if a corporation has the power to prescribe its own laws through its By-Laws there would be no necessity for the State to pass any laws on the subject, and likewise the State Supreme Court has no power to repeal any law of the State of Washington, and appellant respectfully submits that this instant case falls within the provisions of Section 237 (a) of the Judicial Code of the United States and this Supreme Court of the United States has jurisdiction of this appeal of this instant case.

Respectfully submitted,

CLARENCE C. DILL,
E. A. CORNELIUS,
Attorneys for Appellant.

We, the undersigned attorneys for appellees, do hereby acknowledge receipt of a copy of the above Additional Authorities In Support of the Jurisdiction of the Supreme Court of the United States of this appeal:

DILLARD & POWELL,
Attorneys for Appellee, Seattle First National Bank, acting through its Spokane & Eastern Branch, as Receiver for Alder Group Mining & Smelting Company, a defunct corporation.

Date of service July 8, 1943.

CHAS. A. JOHNSON,
Attorney for Appellee, Chelan Mining Company.

Date of service July 10, 1943.

ADAM W. GILLESPIE,
Attorney for Appellee, Methow Gold Corporation.

Date of service July 8, 1943.

Office - Supreme Court, U. S.
FILED
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CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1943

No. 213

TWISP MINING & SMELTING COMPANY,
Appellant,

vs.

CHELAN MINING COMPANY, a corporation, *et al.*,
Appellees.

APPEAL FROM THE SUPREME COURT OF WASHINGTON

PETITION FOR REHEARING

CLARENCE C. DILL,
E. A. CORNELIUS,
Attorneys for Appellant.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1943

No. 213

TWISP MINING & SMELTING COMPANY,
Appellant,

vs.

CHELAN MINING COMPANY, a corporation, *et al.*,
Appellees.

PETITION FOR REHEARING

Comes now the above named, Twisp Mining & Smelting Company, a Washington Corporation, and presents this, its petition for a rehearing of the above entitled cause, and, in support thereof, respectfully shows:

That this Court on October 11, 1943, entered an order which provided:

> "Per curiam: The appeal is dismissed for failure to comply with Rule 12, paragraph 1. The petition for writ of certiorari is denied."

Your petitioner petitions for a rehearing and reconsideration of the appellant's appeal to this Court from the Supreme Court of the State of Washington in the above entitled cause, on the grounds and for

the reasons that this Court has not, as yet, passed upon the merits of appellant's appeal, but simply has dismissed the appellant's appeal for failure to comply with Rule 12, paragraph 1, of the amended rules of this Court of date of April 6, 1942, and appellant duly filed a Motion with the Clerk of this Court on October 27, 1943, for an extension of time in which to prepare and file with the Clerk of this Court a Petition for rehearing, together with an amended statement as to jurisdiction of this Court and on October 28, 1943, this Court granted said motion and extended the time in which such Petition for rehearing, together with an amended statement as to jurisdiction should be filed with the Clerk of this Court to November 26, 1943.

Your petitioner, therefore, attaches to this Petition an amended statement as to jurisdiction of this Court of this appeal, and makes same a part of this Petition the same as if verbatim set forth herein, for the consideration of this Court and for the reasons set forth in said amended statement as to jurisdiction, it is respectfully urged that this Petition for Rehearing be granted, and that the order of this Court of date of October 11, 1943, be, upon further consideration of the amended statement as to jurisdiction, vacated and held for naught and that this Court take jurisdiction over the above entitled cause and decide the case on the merits.

Respectfully submitted,

CLARENCE C. DILL,
E. A. CORNELIUS,
Counsel for Appellant.

STATE OF WASHINGTON, }
COUNTY OF SPOKANE. } ss.

Clarence C. Dill, being first duly sworn on oath deposes and says that he is counsel of record in this cause and hereby certified that the Petition for rehearing of this matter has been prepared and is presented in good faith and not for delay and affiant has reviewed the grounds upon which the petition is based and believes that it is well founded, but owing to the fact that affiant has been called upon to make a trip to Washington, D. C., on other matters and may not be here when the printed Petition for rehearing is sent to the Clerk of the Supreme Court, affiant hereby authorizes this affidavit to be printed in the Petition for rehearing as affiant's affidavit as required by the Rules of the Supreme Court of the United States in support of the fact that this Petition for rehearing is presented in good faith and not for delay.

CLARENCE C. DILL.

Subscribed and sworn to this 29th day of October, 1943.

(Notary Seal) THOS. A. SCOTT.

A Notary for the State of Washington, residing at Spokane, Washington. The Original Affidavit will be filed with the Clerk of the United States Supreme Court, attached to the printed copy of the Petition for rehearing for inspection of the Court if desired.

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TEXT BOOKS

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P. S. A "Printed Copy" of Appellant's petition for rehearing in the State Supreme Court is on file in the office of the Clerk of this Court if Court desires to examine same.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 213

TWISP MINING & SMELTING COMPANY,
Appellants,

vs.

CHELAN MINING COMPANY, a corporation, *et al.*,
Respondents.

FOREWORD

All references to matters found in the following printed Amended Statement As to Jurisdiction, are to the "Certified Unprinted Record of the Clerk of the State Supreme Court" and shall be marked (R. .....), record not yet printed.

However, since Rule 10, Paragraph 4 of the Rules of this Court provides:

> "Whenever it shall be necessary or proper, in the opinion of the presiding judge in the court from which the appeal is taken that original papers of any kind should be inspected in this Court, such presiding judge may make such rule or order for the safe-keeping, transportation, and return of such original papers as to him seems proper, *and this court will receive and consider original papers along with the usual transcript.*" (Italics ours)

In pursuance to that rule the Presiding Judge of the State Supreme Court has made such an order which is on file with the Clerk of this Court and all the original exhibits, original transcript, original statement of fact, which included the opinions of the trial judge, and the supplemental record, have been certified by the Clerk of the State Supreme Court, separately to the Clerk of the United States Supreme Court, as Original Records, to be returned to the Clerk of the State Supreme Court when this case is finally disposed of by this Court.

All references in the following when marked (St. .....), means Statement of Facts of lower court and those marked (R. .....), are to the unprinted record now on file with the Clerk of this Court, but not yet printed.

AMENDED STATEMENT AS TO JURISDICTION

In accordance with Rule 12, of the Rules of this Court, the above named appellant filed the following amended statement disclosing the basis upon which is contended that this Court has jurisdiction upon appeal to review the judgment appealed from.

BASIS UPON WHICH THIS COURT HAS JURISDICTION

The Supreme Court of the State of Washington, the highest Court of said State, assumed legislative authority, and rewrote a "By-Law" different from any "By-Law" of the appellant corporation, which was wholly in conflict with and inconsistent with the terms and spirit of Section 3803-31, Par. 111, Subd.

(d) of Rem. Rev. Statutes (Sup.), of the State of Washington and thereby treated the "Articles of Incorporation" of the appellant corporation, which provided that the powers of the corporation shall be exercised through and its business shall be conducted by a Board of Seven Trustees, as amended, so that the powers of the corporation could be exercised and its business transacted by a Board of Five Trustees and thereby the State Supreme Court committed a reversible error by unlawfully sanctioning and approving the confiscation of the property and property rights of the Stockholders of the Twisp Mining & Smelting Company without due process of law within the meaning of the Fourteenth Amendment to the Constitution of the United States, which specifically provides:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process; nor deny to any person within its jurisdiction the equal protection of the law."

STATUTORY PROVISIONS SUSTAINING JURISDICTION

Section 237 (a) of the Judicial Code; 28 U. S. C. A. (a); 344 (a); the Act of January 31, 1928, 28 U. S. C. A. 861 (a), 861 (b), 45 Stat. 54.

STATE STATUTES INVOLVED

The Uniform Business Corporation Act of the State of Washington of 1933, went into full force and effect on January 1, 1934, and Section 3803-11, Par. 1, Remington's Revised Statutes (Supp.), expressly provides:

> "A corporation which has been formed under this act, or a corporation which existed at the time this act took effect and of a class which might be formed under this act, shall have the capacity to act possessed by natural persons, *but such a corporation shall have authority to perform only such acts as are necessary or proper to accomplish its purposes and which are not repugnant to law.*" (Italics ours)

and, Section 3803-26, of Rem. Rev. Stat. (Supp.), provides:

> "The shareholders of a corporation may make and alter by-laws not inconsistent with law or the articles of incorporation."

The Articles of Incorporation of the Twisp Mining & Smelting Company, appellant herein, expressly provides:

> "The powers of the corporation shall be exercised through and its business shall be conducted by a Board of Seven Trustees * * *."

and, Section 3803-31, Par. 3, subdivision (d), Rem. Rev. Stat. (Supp.), expressly provides:

> "A majority of the board of directors shall be necessary to constitute a quorum for the transaction of business, and the acts of a majority of the directors present at a meeting at which a quorum is present shall be the acts of the board of directors."

and, Section 3803-37, paragraphs 1 and 3, of Rem. Rev. Stat. (Supp.), expressly provides, that the only legal way that the articles of incorporation can be changed, is as follows:

> "Par. 1. A corporation may, at a meeting of the shareholders duly called upon notice of the specific purpose, and in the manner herein provided, amend its articles in any respect so as to include any provision authorized by this act, or so as to extend the period of its duration for a further definite time or perpetually."
>
> "Par. 3. An amendment altering the articles of incorporation in any other respect may be adopted by a vote of the holders of two-thirds of the voting power of all shareholders, or by such vote as the articles of incorporation require."

and, Section 3803-38, paragraphs 1 and 2, of Rem. Rev. Stat. (Supp.), expressly provides under paragraph 1:

> "After an amendment has been adopted, articles of amendment shall be prepared in triplicate originals, setting forth the amendment and the adoption thereof, and shall be signed and sworn to by the president or vice president and the treasurer or secretary or assistant secretary."

And under paragraph 2:

> "The triplicate originals of the articles of amendment shall be delivered to the Secretary of State. If the Secretary of State finds that the articles of amendment conform to law, he shall put an endorsement of his approval upon each set, and when all taxes, fees and charges therefor have been paid as required by law, he shall file one of such sets in his office and record the same and shall issue a certificate of amendment. Thereupon the amendment shall become effective."

The Record herein (R. 3), shows that the Articles of Incorporation (Ex. 1, St. 7) were filed with the Secretary of State on November 10, 1930, and (Ex. 2, St. 7) shows there never was any amendment of the original Articles of Incorporation of the Twisp Mining & Smelting Company.

Such laws were construed in *In re Dolgeville*, 160 N. Y. 500, 55 N. E. 287, where the facts briefly were:

The stockholders of the Dolgeville Electric Light and Power Company duly called a meeting of the Stockholders for the specific purpose of procuring an amendment of its articles of incorporation, which provided that the business of the corporation should be conducted by a board of thirteen directors, so as to give the corporation the power to transact business with a board of five directors and such a resolution was duly passed at that meeting of the stockholders, where the required number were present, but the resolution was never filed with the secretary of state as required by the statute, and without filing said resolution with the secretary of state the five directors applied to the court to have the Dolgeville Electric Light and Power Company dissolved and the court held:

> "The statutory provisions regulating the increase or decrease of directors of a corporation required the calling of a meeting of the stockholders, and authorized the determination of the question by a vote of those owning a majority of the stock and provided 'The proceedings of such meet-

ing shall be entered in the minutes of the corporation and a transcript thereof, verified by the president and secretary of the meeting, shall be filed in the office where the original certificate of incorporation were filed.' After careful examination of the origin and history of the statute, and due consideration of the object which the legislature aimed to accomplish by the several steps which it required shall be taken to effectuate an increase or reduction in the number of directors, we have concluded that it must be held that the number of directors of the Dolgeville Electric Light and Power Company was not reduced until after the filing of the transcript of the minutes of the corporation with the Secretary of State and the County Clerk, and as that was not done until after these proceedings were instituted it follows that the petition presented to the Court was not signed by a majority of the directors, and therefore the Court was without jurisdiction to make any order in the premises."

Section 2586 of Rem. Rev. Stat. of the State of Washington expressly provides:

> "The false making or forging of any instrument or writing purporting to have been issued by or in behalf of a corporation * * * and bearing the pretended signature of any person therein falsely indicated an agent or officer of such corporation, * * *, is forgery in the same degree as if that person were in truth such officer or agent."

DATE OF JUDGMENT AND DATE OF APPLICATION FOR APPEAL

The judgment of the State Supreme Court sought to be reviewed was entered on March 29, 1943 (R. 45).

The application for an order allowing the appeal to this Court was presented to the Chief Justice of the State Supreme Court on May 29, 1943, and the order allowing the appeal was duly signed by the said Chief Justice and duly lodged with the Clerk of the State Supreme Court for transportation with the record on appeal to the Clerk of the United States Supreme Court and became effective on May 29, 1943 (R. 53).

STATEMENT OF THE CASE

This action was brought on the equity side of the Superior Court of Okanogan County, State of Washington, to recover certain real property, and the possession thereof, and to recover the possession of certain unpatented mining claims and also to recover possession of certain patented mining claims and quiet title and right of possession in the Twisp Mining & Smelting Company, appellant herein, and remove the cloud of a purported quit-claim deed, wrongfully made in the name of the Twisp Mining & Smelting Company by individuals, pretending to be the president and assistant secretary of the Twisp Mining & Smelting Company without any legal authority or consideration moving to the Twisp Mining & Smelting Company, of date of January 31, 1934, being exhibit 20, herein, all of which facts were known to Robert H. Strong, the purported vendee in said purported quit-claim deed (R. 9), and to obtain an accounting for the ore unlawfully removed from said premises and sold to certain smelters.

Exhibit 20 shows on its face that the property and property rights that were purported to be conveyed by said void quit-claim deed consisted of two homesteads, recorded in Book 76 of Deeds, page 416, on June 27, 1932; the possessory right in certain unpatented mining claims, recorded in Book 76 of Deeds, page 417, on June 27, 1932; and the assignment of an executory sale contract of three patented mining claims, by the Alder Group Mining & Smelting Company, as vendor, to the Twisp Mining & Smelting Company, as vendee by said assignment recorded in Vol. 9 of Miscellaneous Records, p. 303, on June 27, 1932, and as further shown from the Original Exhibits Nos. 4, 5, 6, 6A and 6B, which are on file in the Clerk's office of this Court for inspection, if desired, by order of the Chief Justice of the State Supreme Court and all of the appellees base their pretended rights to the property above mentioned, and their right to possession thereof on the purported rights that Robert H. Strong might have obtained, by reason of the void quit-claim deed made in the name of the Twisp Mining & Smelting Company on January 31, 1934, exhibit 20 herein (R. 1, 2).

It is settled by the State Supreme Court in *Hutchison Realty Co. v. Hutchinson*, 136 Wash. 184, 239 Pac. 388, that this instant case is not an action predicated on fraud, but is simply an action to try title to the real property and the exclusive right to the possession and enjoyment of the property and property

rights mentioned and set forth in said Exhibit 20, under Sections 785, 786 and 793 of Rem. Rev. Statutes, wherein "the superior title whether legal or equitable shall prevail," and this action was duly commenced on May 7, 1940, within the seven-year period, from January 31, 1934, the date of the purported quit claim deed, under Section 793 of Rem. Rev. Statutes.

It appears from the "AGREED RECORD" as "CERTIFIED BY THE CHIEF JUSTICE OF THE STATE SUPREME COURT" that "EXHIBIT NO. 7," contained all the minutes of the Twisp Mining & Smelting Company from the date of its organization to and including January 31, 1934 (R. 3). And it appears from said Exhibit No. 7, that the Board of Seven Trustees of the Twisp Mining & Smelting Company duly held a special meeting of the Board on August 15, 1932, at which a quorum was present, and did duly accept and approve a sale of one million, five hundred thousand shares of the Capital Stock of the Twisp Company to John Goetz, to resell and raise funds to operate the said mining venture and James O. Cull, the attorney for the Twisp Mining & Smelting Company at that meeting caused John B. Hottel and Charles W. Julian to resign as "Trustees" and caused John Goetz and Frederick C. MacDonald to be elected as "Trustees" in their place and further caused John C. Sawbridge to resign as "President" and elected John Goetz as "President" in his place in order to place John Goetz in a position where he could best promote the resale of the stock he had pur-

chased and the then Board of Seven Trustees did authorize the Secretary to issue five thousand shares of the stock purchased in the name of John B. Hottel and to send them to John Goetz to sign as the "President" of the Twisp Mining & Smelting Company (R. 5 and 6), and thereafter John Goetz did sign and issue the stock referred to in said resolution of the Board of Seven Trustees, as "President," and did thereby accept the office of "President" of the Twisp Mining & Smelting Company and remained its "President" thereafter and no person was ever elected in his place as "President" of the Twisp Mining & Smelting Company (R. 6 and St. A-1 to 15).

Mr. Cull, however, testified that he, without any legal authority of the appellant corporation, negotiated a sale of the property and property rights of the Twisp Mining & Smelting Company with one, Robert H. Strong, and that he had made two trips to Portland, Oregon, to see Mr. Strong and furnish Mr. Strong with all of the information concerning the affairs of the Twisp Mining & Smelting Company and that Mr. Strong was to organize a Washington corporation to take over appellant's property and property rights and that he, Mr. Cull, was to be named as one of the directors of the new corporation to be known as the Chelan Mining Company and that he was also to be elected as assistant secretary and local agent and he confessed that the Magneys never were consulted or knew anything about the transaction during his negotiations with Mr. Strong (R. 6 and 7).

It further appears from the record (R. 6), that it was arranged by Mr. Cull with Mr. Strong, that Mr. Cull would arrange a secret meeting of four of the Trustees of the Board of Seven Trustees to pass a resolution to sell all the assets of the Twisp Mining & Smelting Company to Robert H. Strong, as agent for the Chelan Mining Company and Mr. Cull testified that this meeting was held on January 17, 1934, and Mr. Cull testified that he didn't send out any formal notices to each of the trustees, as required by the by-laws of the Twisp Mining & Smelting Company, but that he had an understanding with four of the Trustees to hold such meeting (R. 6).

That special meeting of the Board of Seven Trustees, without formal notice, convened on January 17, 1934, but only three trustees appeared in person and Mr. Cull attempted to have those three minority trustees pass a resolution to sell all the assets of the Twisp Mining & Smelting Company to Robert H. Strong for the Chelan Mining Company and Mr. Strong and his attorney Mr. Cole were present and Mr. Cole raised the question of the validity of the meeting for lack of proper notice and it was decided that the meeting was not a legal meeting and those present decided to call a new meeting and give proper notice for a special meeting to be held on January 30, 1934 (R. 7 to 9). In order to show this Court the exact situation we are going to quote "James O. Cull's" own words:

> "There was notice to the Directors that we recognize, except Roy Magney, who was absent

> * * *. Mr. Simons notice had been sent to him but so far as a notice as required under the By-Laws to hold a meeting to act upon the questions then considered, *it was not a regularly called meeting. We decided to give notice and hold a meeting later.*" (St. 26. On file for reference with Clerk of this Court).

It further appears (R. 9), that the call for the special meeting of the Board of Seven Trustees provided that formal notices should be sent 8 days before the meeting, but Mr. Cull did not want Roy K. Magney present at that meeting, so Mr. Cull did not mail a notice to Roy K. Magney until January 24, 1934, and did not send any notice to either Frederick C. MacDonald or John Goetz, and Mr. Cull gave as his excuse for not sending the notice to Roy K. Magney, as required, that he did not know his address (R. 9), when he further testified that he knew that Roy K. Magney was engaged in mining in Denver, Colorado (R. 6). Mr. Cull's own words being:

> "I (Mr. Cull) knew in the fall of 1933 they were in Colorado, because one of them had mailed me a newspaper with a marked section showing the transaction of some business there." (St. 79)

On January 26, 1934, the Chelan Mining Company was incorporated, and Mr. Cull was named one of its directors and on January 29, 1934, Mr. Cull was elected as one of the assistant secretaries and local agent of the Chelan Mining Company and Robert H. Strong and James Cole, his attorney, also were named as directors and Robert H. Strong was elected "President"

and James Cole was elected as the other assistant secretary and the following resolution was passed at that meeting of January 29th, 1934:

> "Be it generally Resolved, That said Robert H. Strong be and he is hereby given the authority and powers requested in and by said letter, whether they are in these resolutions specifically mentioned or not, as it is the desire of these directors to place Mr. Strong in a position to proceed in behalf and in the name of this Company with the various matters and things referred to in the letter mentioned, in the manner and under the terms and conditions set forth in said letter * * *." (R. 9)

And with that authority and power expressly conferred upon him, Mr. Strong, his attorney James Cole and James O. Cull, went to and were present on January 30, 1934, when that purported special meeting of the Board of Seven Trustees of the Twisp Mining & Smelting Company convened and knew that there was only three trustees present, when it required four to be present to constitute a quorum to legally transact any business of the Twisp Mining & Smelting Company, but as evidently agreed between Mr. Strong, as President of the Chelan Mining Company, and Mr. Cole and Mr. Cull its assistant secretaries, Mr. Cull, without any authority of law, informed those three minority trustees and Mr. Strong and Mr. Cole, that there was at that time two vacancies on the Board of Seven Trustees of the Twisp Mining & Smelting Company and that those three minority trustees had power to transact any business of the Twisp Mining & Smelt-

ing Company, as a Board of Five Trustees, and therefore Mr. Cull caused the three minority trustees to pass the following resolution:

> "BE IT FURTHER RESOLVED that no action be taken at this time to fill the vacancy on this Board and that the Board of Five Trustees as now constituted shall proceed with all business pertaining to the Company." (R. 9 and 10)

In other words, Mr. Cull, a director, assistant secretary and local agent of the Chelan Mining Company, in the presence of its "President" Mr. Strong and his attorney, James Cole, attempted to "Amend the Articles of Incorporation" of the Twisp Mining & Smelting Company, which provided for a "Board of Seven Trustees" to a Board of Five Trustees, an act that was not within the power of said minority trustees to do and therefore constituted an ultra vires act, which rendered the result of that purported special meeting of that Board of Seven Trustees absolutely null and void, not merely voidable, but simply void and that even prior to reversal, because those three minority trustees had no power or authority to authorize the sale of the Twisp Mining & Smelting Company's assets, or to authorize Mr. Cull to be appointed as "Assistant Secretary" to make a deed and Mr. Strong took said void quit claim deed of date of January 31, 1934, Exhibit 20 herein, with full knowledge of the undisputable fact that John C. Sawbridge, Jr., was not the "President" and James O. Cull was not the "Assistant Secretary" of the Twisp Mining & Smelting Company and of necessity knew that said

deed was not the genuine deed of the Twisp Mining & Smelting Company and further Mr. Cull, a director, local agent and one of the assistant secretaries of the Chelan Mining Company, testified (R. 10 and 11), that he received the purported consideration for said deed, said certificate of stock of the Chelan Mining Company for 250,000 shares of its stock, and held it and never even notified the Twisp Mining & Smelting Company that he had it, until April 5, 1939, when he offered to deliver same to the New Board of Trustees of the Twisp Mining & Smelting Company in order to consumate the illegal purported transfer of the Twisp Mining & Smelting Company's assets to the Chelan Mining Company and that his offer was refused and there never was in law any legal consummation of that illegal transaction of Robert H. Strong, as "President" of the Chelan Mining Company, with the three minority trustees in regard to the sale of the Twisp Mining & Smelting Company's assets ever made.

GROUNDS UPON WHICH IT IS CONTENDED THE QUESTIONS INVOLVED ARE SUBSTANTIAL

The Twisp Mining & Smelting Company is a corporation and being a creature of law whose life is dependent upon the provisions of law, must be governed strictly by those provisions and the "Articles of Incorporation" of this corporatiton provided that the powers of the corporation shall be exercised through and its business shall be conducted by a Board of Seven Trustees, are supreme and controlled all acts

of said Board. It is absurd for the State Supreme Court to say, as it did say (R. 35), that the "Articles of Incorporation" do not say how many trustees shall constitute a quorum to transact business of the corporation, because the Articles of Incorporation fixed the number of the Board of Trustees that had any power to transact any business of the corporation and that being fixed the statute steps in and fixed the number of trusteees who can hold a legal meeting of the Board of Seven Trustees as being a majority of the entire Board of Seven Trustees and it is likewise absurd for the State Supreme Court to hold that any number of trustees less than a quorum of that Board of Seven Trustees could in any manner convene legally or illegally to transfer the assets of this corporation or to in any manner change the constituted number of trustees that must be present, under the law, to transact any business of any kind of the appellant corporation and it is likewise clear that unless there was a regularly called meeting of the Board of Seven Trustees and a quorum of four trustees present, those present who constituted the minority of the Board of Seven Trustees had no power or authority to appoint any officer or do any legal act of any kind.

It is a legal absurdity, then, for the State Supreme Court to say that any number of trustees, less than four, of this legally existent corporation could transfer any of the assets, capital or otherwise, from the legal ownership of the appellant corporation to some third person in direct contravention of the constitu-

tional rights of the stockholders of said corporation, without any consideration, legal or otherwise. The whole transaction of these minority trustees with Robert H. Strong was a farce. A more iniquitous and damaging holding could scarcely have been conceived by the members of any court in a republic. The very essence of this question, as set out in this Statement as to Jurisdiction, proves beyond a peradventure of a doubt that the laws relating to corporations of the State of Washington and the laws relative to the transfer of real property have been by this decision of the State Supreme Court most violently attacked; and this is especially true in the light of the Fourteenth Amendment to the Constitution of the United States wherein it is provided that the protection of law shall be equally applied and further provides that no property shall be taken without due process of law. The same provision, as adopted by the Constitutional Convention of the State of Washington at the very inception of the reign of state law in the State of Washington, makes a similar provision and acknowledges that the Constitution of the United States is the supreme law of the land.

Due process of law, preserved for all by the Fourteenth Amendment to the Constitution of the United States, commands that no such practice as that disclosed by the record in this instant case can be allowed to stand, and no higher duty, no more solemn responsibility, rests upon this Court, than that of translating into living law and maintaining this constitutional

shield deliberately planned and inscribed for the benefit of every human beng subject to our constitution.

The Constitution of the United States being what it is, it is obvious that the entire proceedings of these appellees have been in direct violation of the provisions of the Fourteenth Amendment to the Constitution of the United States and therefore there is a "Federal Question" vitally important to the entire corporate practice in the United States, and that question is involved in this proceeding and calls for the supervision of this Court to protect the stockholders' rights in the appellant corporation, from being deprived of their property without due process of law and it is manifest, then, that the grounds presented by this appellant to this Court for a review of this case are substantial.

MANNER IN WHICH FEDERAL QUESTIONS WERE RAISED

The Federal questions here involved were first raised before the trial court by the pleadings, under the version of those pleadings as stated by the trial judge, in his memo opinion of date of January 7, 1941, where he stated at page 341, of the Statement of Facts, now in the office of the Clerk of this Court for inspection, by order of the Chief Justice of the State Supreme Court, as follows:

> 'It is plain from the allegations of the complaint * * * that the plaintiff is seeking to stand

squarely on the proposition that the actions of the trustees of the plaintiff in January, 1934, were wholly without authority and therefore did not bind the plaintiff corporation, and that the illegal character of the performance was known to the officers and agents of the Chelan Mining Company,—in fact the plaintiff alleges that the agents and managing officers of the Chelan Mining Company participated in, and were accessories in those unlawful and illegal proceedings carried on in January, 1934, when ostensibly the properties of the plaintiff were conveyed to the defendant, Chelan Mining Company. * * *, and that all the allegations in the complaint to the effect that the officers and agents of the Chelan Mining Company aided, abetted, cajoled and induced the officers of the plaintiff in the illegal perpetrations, are to be taken and considered merely for the purpose of showing that the Chelan Mining Company had notice all along of the invalidity and unholy character of the color of title which it acquired."

But the trial court in his memo opinion of date of February 5, 1942, after the trial of the case, stated on page 352, of the Statement of Facts, as follows:

"I am impelled to conclude that the action of those purporting to constitute the Board of Trustees * * * of the Twisp Mining & Smelting Company was legal and valid. I think this for various reasons: one of the most cogent of these reasons being that the By-laws of the corporation provide in regard to a quorum as follows: 'A majority of the Board of Trustees, *for the time being in office,* shall constitute a quorum for the transaction of business.' It appears by the minutes of a meeting held August 15, 1932, that the resignation of John B. Hottel and Charles W. Julian as trustees was accepted and John Goetz and Frederick C. McDonald were elected as trustees

> to fill the vacancy. See Pltf's Ex. No. 7. Mr. James O. Cull of Yakima * * * testified that neither Goetz nor McDonald ever qualified nor as much as sent in anything to signify that they had accepted their appointments on the Board of Trustees. * * * The plaintiff has offered some argument to the effect that under the laws existing, a trustee * * * of a corporation did not need to formally qualify, but be that as it may, there certainly should be something to show that such appointee at least *accepted* the office. * * * This being the situation I am constrained to hold that neither Goetz or McDonald ever became a member of the Board of Trustees of the Twisp Mining & Smelting Company. Hence, it follows that there were only five members in office during the month of January, 1934. * * * It of course obviously follows that if there were only five trustees in office during January, 1934, then three would be a majority and hence a quorum."

Appellant, by motion to re-open the case for proof of the fact that at least John Goetz had qualified both as a "Trustee" and "President," and was recognized by the Board of Seven Trustees at the special meeting of August 15, 1932, and the trial judge rejected said evidence and denied the appellant's motion (R. 5 and 6) and in a Supplemental Opinion of date of February 25, 1942, the trial judge stated:

> "Now we come down to, and I will next take up the discussion of the validity of that deed. As I said before, that thing has been a regular headache to me. There is no general principles underlying that controversy; it is just a matter of statutory construction, but in view of the fact that the Uniform Business Corporation Act of 1933, as it appears in Section 31, Laws of 1933, Chapter

185 reads: 'Except as otherwise prescribed in the Articles of Incorporation or By-Laws.' Therefore, I assume that the By-Law may prescribe something different from that which is in the statute with regard to what constitutes a quorum." (St. 366 and 367)

MANNER IN WHICH QUESTIONS INVOLVED WERE PASSED UPON BY THE STATE SUPREME COURT

The State Supreme Court, in its opinion, which is set out in the record (R. 18 to 43), a copy of which is attached hereto as Exhibit "A," admits that the following assignments of error were claimed by the Twisp Mining & Smelting Company, to-wit:

> "The trial court erred in holding that three members of a board of seven trustees, at an informal gathering, legally represented appellant, and had a lawful right to transact business for appellant; in holding in substance that those three trustees had power and authority to appoint an assistant secretary; in holding there was any by-law of appellant which in any way prescribed something different from that which is in the statute in regard to what constitutes a quorum; in assuming there was a legal special meeting of the board of seven trustees held on January 30, 1934; in further holding that those three trustees had any power or authority to pass a resolution of any kind which would be binding on the appellant, and in not holding that the acts of those three trustees were *ultra vires* and absolutely void from their inception." (R. 18 and 19)

The State Supreme Court held on the above assignments of error:

> "It is true the articles do provide the power of the corporation shall be exercised through a board of seven trustees. It is also true that the articles do not say how many trustees shall constitute a quorum to transact business. However section 6, of article 2, of the by-laws, provides that a majority of the board of trustees, *for the time being in office*, shall constitute a quorum for the transaction of business." (R. 35)

Saying: "Appellant argues that the overwhelming weights of authority, as stated in Fletcher's Cyc. of Corporations, Vol. 9, p. 168, 392, is that when the power to do particular acts, or general authority to manage the affairs of a corporation, is vested in a board of trustees, they are vested in the trustees not individually, but as a board, and the trustees can act so as to bind the corporation only when they act as a board and at a legal meeting. Appellant states the rule and the reasons thereof are well stated in Ames v. Goldfield Merger Mines Co., 227 Fed. 292. *We may admit the above rule is a correct statement of the law, but we fail to see where it is applicable here.*" (R. 37) (Italics ours)

And further saying: "It is also contended by appellant that the effect of what the trustees did was to change the number of trustees from seven to five, and that this could not be done, as this power was vested in the stockholders (R. 37). It seems to us perfectly plausible and reasonable that a situation such as here presented was contemplated at the time the by-laws were passed. The next reference to Fletcher's Cyc. of Corporations is Vol. 2, pages 206, 421, from which appellant quotes. This quotation is not applicable here,

> for the reason it covers a situation where the by-laws provide 'that a majority of the directors shall be necessary and sufficient to constitute a quorum,' *not a majority of the trustees then in office, as in the instant case.*" (R. 38) (Italics ours)

The Uniform Business Corporation Act, as cited by the State Supreme Court as Rem. Rev. Stat. (Supp.) Section 3803-11, paragraph 111, subd. "d," provides:

> "A majority of the board of directors shall be necessary to constitute a quorum for the transaction of business, and the acts of a majority of the directors present at a meeting at which a quorum is present shall be the acts of the board of directors." (R. 36)

The By-Law in question, Section 6 of article 2, provides:

> "*A majority of the Board of Trustees,* for the time being in office, shall constitute a quorum for the transaction of business, but, if at any meeting of the Board there shall be less than a quorum present, a majority of those present may adjourn the meeting from time to time until a quorum shall be present." (Italics ours)

The "Articles of Incorporation" fixed the number of trustees that constituted the "Board" as a "Board of Seven Trustees." It is true that under the law heretofore cited, those "Articles of Incorporation" can be amended by the stockholders, as provided by law and the only plausible or reasonable interpretation of Section 6, Article 2, of the above By-Law, is that there must be a majority of the entire board of

trustees, which is designated in the "Articles of Incorporation" at the time any special meeting of the Board of Trustees is legally held to constitute a legal quorum, and that By-Law as so interpreted does not prescribe anything different from Section 3803-31, Paragraph 111, subd. (d) of Rem. Rev. Stat. (Supp.)

The State Supreme Court, however, assumed legislative authority, and rewrote a new By-Law, which would provide: "*A majority of the trustees then in office*" shall constitute a quorum, and thereby attempted to amend the "Articles of Incorporation" from a "Board of Seven Trustees" to a "Board of Five Trustees" and apparently realizing that "Section 6 of Article Two" of the "By-Laws" did not provide that less than a majority of the entire board of seven trustees had any power or authority to transact any business of the Twisp Mining & Smelting Company, the State Supreme Court rewrote a new "By-Law" which provided:

> "A majority of the trustees then in office, instead of the words of the section 6, article two, of the actual by-law" (R. 37)

and said:

> "The meetings of January 17 and 30, 1934, were regularly called special meetings. The directors met as a board, and a quorum of the directors *then in office being present*, proceeded as a board to transact the business of the corporation, referred to in the notice given of such meetings." (R. 37). *And further said:*

> "In view of the fact that the articles contain

> no provisions relative to a quorum, we are of the opinion it was within the power of the corporation to pass a by-law prescribing the number of directors necessary to constitute a quorum for the transaction of business, unless such by-law was in conflict with Rem. Rev. Stat. (Supp.) 3803-31, paragraph 111. We are of the opinion that the section last above cited does not help appellant, for as we read that section, subdivision 'd', quoted by appellant, would not apply where the corporation in either its articles or by-laws, had provided what should constitute a quorum, as was done in this case. (R. 36 and 37) * * * The meetings of January 17 and 30, 1934, were regularly called special meetings. The directors met as a board, and a quorum of the directors *then in office being present,* proceeded as a board to transact the business of the corporation, referred to in the notice given of such meetings." (R. 37)

The State Supreme Court did not base its opinion, as above stated, on facts, because Mr. Cull, who wrongfully took charge of calling these meetings of January 17 and 30, 1934, for the benefit of the Chelan Mining Company, in order to confiscate the property and property rights of the stockholders of the Twisp Mining & Smelting Company, testified:

> "There was notice to the Directors that we (*Mr. Cull, Mr. Cole and Mr. Strong, three of the directors of the Chelan Mining Company, and President and Assistant Secretaries*) recognized, except Roy Magney, who was absent and I didn't know at the time where he was. Mr. Simonds' notice had been sent to him *but so far as a notice as required under the By-Laws to hold a meeting to act upon the questions then considered, it was not a regularly called meeting.*" (R. 7 and 9, St. 26) (Italics ours)

And Mr. Cull further testified that he did not send any notice to Roy K. Magney until January 24, 1934, of the January 30, 1934, special meeting, when the secretary was directed to give not less than eight days' notice to each trustee, and further testified that he gave no notice at all to Mr. Goetz or MacDonald, of any meeting and Section 5 of Article Two of the By-Laws expressly provided:

> "The secretary shall give notice of each special meeting (of the Board of Trustees) by mail, * * * to each trustee; * * *."

and the law, as stated in *Bruch v. Nat.* (Del.), 116 Atl. 738, provides:

> "Unless notice be given to each director, as required by by-laws of the corporation, the meeting is illegal, and action taken is not binding."

and therefore, we present to this Supreme Court of these United States, a situation where the "Secretary" never gave any legal notice of the special meeting of the Board of Seven Trustees of January 17, 1934, or January 30, 1934, and the Twisp Mining & Smelting Company cannot be held accountable for the usurped actions of Mr. Cull, who was not the secretary of the Twisp Mining & Smelting Company and had absolutely no authority to mail notice of any special meeting of the Board of Seven Trustees to the "Trustees" that he and his associates recognized as being entitled to notice of such meetings, and there never was in truth or in fact or in law, a legal special meeting of the Board of Seven Trustees of the

Twisp Mining & Smelting Company ever held on January 17, 1934, or January 30, 1934.

The State Supreme Court (R. 40 and 41) says:

> "Appellant contends that the acts of the three directors were *ultra vires,* and therefore void, and being void, such acts could not be ratified or the company estopped from questioning the validity of the deed. (*Referring to the Quit-claim Deed made in the name of the Twisp Mining & Smelting Company, by John C. Sawbridge, as 'President,' and James O. Cull, as 'Assistant Secretary,' without any consideration, moving to the Twisp Company or legal authority to execute said deed as 'President' or as 'Assistant Secretary' of date of January* 31, 1934.) In the first place, the acts of the three directors in passing the resolution of January 30, 1934, and the execution of the deed were not acts *ultra vires* the corporation, for clearly the corporation was not prohibited from passing such resolution or from executing such a deed. The term 'Ultra Vires,' in so far as it applies to corporate transactions, is used to describe corporation transactions which are outside the objects for which the corporation was created, *as defined in the law of its organization and therefore beyond the power conferred on the corporation by the legislature.*" (Italics ours to clarify)

The law of this instant case, as conferred on this corporation, the Twisp Mining & Smelting Company, expressly provides:

> "A corporation * * * which existed at the time this act took effect and of a class which might be formed under this act, shall have the capacity to act possessed by natural persons, but such a corporation shall have authority to perform only

> such acts as are necessary or proper to accomplish its purpose and which are not repugnant to law."

and, Section 3803-26, of Rem. Rev. Stat. (Supp.) provides:

> "Para. 1. 'The shareholders of a corporation may make and alter by-laws not inconsistent with law or the articles of incorporation'."

and, Sections 3803-37 and 3803-38, of the same law, provides that the "Articles of Incorporation or Charter" is supreme unless properly amended by a vote of the majority of the stock issued and that Uniform Business Corporation Act does not grant any power or authority to the Board of Trustees, to even vote on an amendment of the "Articles of Incorporation" in any way and therefore the attempt of the three minority trustees in this instant case, to declare that the Board of Seven Trustees should be treated as a Board of Five Trustees in order to illegally transact business of the Twisp Mining & Smelting Company was clearly *ultra vires* the corporation, for the obvious reason that said minority trustees had no power or authority to reduce the Board of Seven Trustees, to a Board of Five Trustees, and this instant case comes within the rule stated in *In re Dolgeville*, 160 N. Y. 500, 55 N. E. 287, *supra*, and this instant case is controlled by the principles stated in *Central Trans. Co. v. Pullman Car Co.*, 139 U. S. 24 to 61, 35 Law ed. 55 to 68, where this Court in passing on this important question, held:

> "The views which this Court has taken of the

question presented by this branch of the case and the only view which appears to us consistent with legal principles, is as follows:

"A contract of a corporation, which is ultra vires, in the proper sense, that is to say, outside the object of its creation as defined in the law of its organization, and therefore beyond the powers conferred upon it by the legislature, is not voidable only, but wholly void and of no legal effect. The objection to the contract is not merely that the corporation ought not to have made it but that it could not make it. The contract cannot be ratified. No performance on either side can give the unlawful contract any validity, or be the foundation of any right of action upon it. Where a corporation is acting within the general scope of the power conferred upon it by the legislature, the corporation, as well as persons contracting with it, may be estopped to deny that it has complied with the legal formalities which are requisites to its existence or to its action, because such requisites might in fact have been complied with. *But when the contract is beyond the powers conferred upon it by existing law,* neither the corporation, nor the other party to the contract, can be estopped, by assenting to it, or by acting upon it, to show that it was prohibited by those laws." (Italics ours) (See *Kent v. R. M. Co.*, 78 N. Y. 179, to same effect.)

In this instant case, it is not even disputed, that these three minority trustees had no power to transact any business of the Twisp Mining & Smelting Company, *as a Board of Seven Trustees.* They had no power to change that Board of Seven Trustees to a Board of Five Trustees and of necessity there was no legal special meeting of the Board of Seven Trustees

ever held on either January 17 or January 30, 1934. There was therefore no legal resolution ever passed and there never was any effectiv authorization given to anyone to sell the assets of the Twisp Mining & Smelting Company to Robert H. Strong, for the Chelan Mining Company and there was no effective authorization to any person to execute any quit-claim deed in the name of the Twisp Mining & Smelting Company and without such effective authorization there never was any genuine quit-claim deed of the Twisp Mining & Smelting Company ever made and the State Supreme Court admits (R. 19), that appellant on appeal to the State Supreme Court made the further assignments of error of the lower court, to-wit:

> "In holding there ever was any legal consummation of the illegal transaction of Robert H. Strong with the three trustees; in holding that the deed made in the name of appellant as grantor to Robert H. Strong, as grantee, on January 31, 1934, was a valid deed, and in not holding that it was a forged deed; in holding that under the facts of this case the doctrine of estoppel, or laches, or even ratification, is applicable or available to respondents, by reason of the fact that the deed being a forged deed, no life could be breathed into it under any circumstances; in denying appellant's motion to reopen the case for further evidence, and in denying appellant's motion for new trial; and in entering judgment dismissing appellant's action."

In *Hotaling v. Hotaling* (Cal.), 224 Pac. 435, the identical question involved in this instant case was passed upon and the court held:

> "Under the statute it required a majority of the board shall constitute a quorum. The articles provide that nine shall compose the board of directors. Five met at a meeting, but one was interested because the deed to be executed was to transfer certain property of the corporation to one of the five directors present. By the resolution adopted by the remaining four the president and secretary were authorized to execute a deed of conveyance to Richard M. Hotaling, one of the members of the board present, of real estate belonging to the corporation. The deed was executed and recorded. The question of the validity and effect of the deed formed the subject-matter of this action. The trial court held the deed was void and the appellate court affirmed the trial court's ruling, and in doing so used this language: * * * *'the deed under which Richard M. Hotaling claims as an attempted corporate act, must, we think, be conceded to have been invalid from its inception for the reason that its execution was never effectively authorized by the Board of Directors of the corporation in whom was vested the sole power to give such authority.'* * *." (Italics ours)

and in this instant case, there being no legal special meeting of the Board of Seven Trustees, and there being no legal quorum present, there was no legal resolution ever passed and of necessity under such a state of affairs there was absolutely no legal authorization ever given to any person, to either John C. Sawbridge, Jr., or James O. Cull, to execute any deed in the name of the Twisp Mining & Smelting Company, and they both knew that fact and under the provisions of Section 2586 of Rem. Rev. Stat. said purported quit-claim deed was in fact and in law a "Forged Quit

Claim Deed" and under *Almo Trust Co. v. Cunningham* (Tex.), 203 S. W. 1105, it was held:

> "The forged deed could not affect the title to the land, and was therefore not entitled to record. The provisions of the statutes as to deed being void as to subsequent purchasers, without a notice, if not recorded, have no application to forged deeds. Reliance on a recorded forged deed may bring loss on him who so relies, but it cannot affect the rights of the owner of the property. A man cannot be deprived of his property by a forged deed, no matter in what good faith the party acted who claims under it. The forged instrument is as absolutely void and ineffective as though it had never existed."

and, in *Lewis v. Kuyawa*, 158 Wash. 607, 617, 291 Pac. 1105, the court held the same doctrine saying:

> "It is unquestionably the general rule that one holding under a forged instrument, however ignorant he may be of the forgery or how much of value he may have parted with in reliance on the genuineness of the instrument, cannot claim protection against the title of the rightful owner. As some courts have said, it would be a monstrous doctrine to hold one, by forging a deed of his neighbor to himself could in any way affect the title of his neighbor."

and in this instant case, it was the Chelan Mining Company's own officer, Mr. James O. Cull, who forged the Quit Claim Deed, and without question the one who wrongfully induced John C. Sawbridge, Jr., to sign as "President" when Mr. Cull well knew that John C. Strawbridge, Jr., was not the president of the Twisp Mining & Smelting Company and this in-

stant case falls within the rule of the *Pittsburg & W. Virginia Gas Co. v. Prentess Gas Co.* (W. Va.), 100 S. E. 296, 7 A. L. R. 901, where the court held:

> "Why should one be treated as acting in good faith, who knows all the facts, when properly construed, gives him no title to the lands. * * * Such a holding would make every man a judge of the law in his own case, instead of being bound by the laws as interpreted by those who are charged with that duty. We must therefore conclude that the defendants were wilful trespassers, just as much as though there had been no question but that the plaintiff had the superior rights. They could not decide the disputed question in their own favor, and then proceed with the hope that their acts would be characterized by the court as in good faith, even though their judgment upon the law of the case should not be approved."

The Uniform Business Corporation Act of the State of Washington prohibits any corporation from doing any act repugnant to the provisions of that act, and that act expressly provides that the "Stockholders" of any corporation has no power or authority to pass any "By-Law" that is inconsistent with the articles of incorporation of that corporation and the law is well settled by the great weight of authority that any "By-Law" which is in conflict with and repugnant to the articles of incorporation is absolutely null and void, as held in Fletcher's Cyc. on Corporations (Permanent Edition), Vol. T, p. 723, Section 4190, to-wit:

> "By-laws, to be valid, must be consistent with the terms and spirit of the charter of the corporation * * *. A by-law which is not thus con-

> sistent with the charter, but in conflict with and repugnant to it is void."

And in *Gentry-Futch Co. v. Gentry* (Florida), 106 So. 473, the court in a case where a by-law of a corporation provided no business should be transacted at any meeting without there being 75 per cent of the stock represented, held:

> "This provision of the by-laws is void, being in conflict with section 4082 of Revised General Statutes of 1920, which reads: 'A majority of the stock shall constitute a quorum at stockholders' meetings.' This announced a general statutory policy and principle which, of course, cannot be changed by a corporate by-law."

Therefore, it is obvious, that when the State Supreme Court rewrote a "New By-Law" for the purpose of reducing the Board of Seven Trustees of the Twisp Mining & Smelting Company, to a Board of Five Trustees, its unauthorized act, was repugnant to the provisions of the Fourteenth Amendment to the Constitution of the United States and merely amounted to an effort of the State Supreme Court to approve the appellees' unlawful acts in their efforts to confiscate the property and property rights of the stockholders of the Twisp Mining & Smelting Company without due process within the meaning of the Fourteenth Amendment to the Constitution of the United States and its opinion in doing so was entered on January 18, 1943.

The appellant, after receiving the said opinion, duly

filed within the time allowed by rules of the State Supreme Court, a formal printed Petition and a Supplemental Petition for a rehearing before the entire State Supreme Court and contended among other things, that the Departmental opinion substantially held that the "By-Law" of the Twisp Mining & Smelting Company was on a higher plane than its "Articles of Incorporation" and that the stockholders of the Twisp Mining & Smelting Company were vested with a constitutional right to rely on the Charter of the Twisp Mining & Smelting Company being given full force and effect and that the Constitution of the United States under the Fourteenth Amendment guaranteed them that right and cited *Bergman v. St. Paul Mut. Bldg. Assn.* (Minn.), 13 N. W. 120, among other cases, where the court held:

> "The authority to pass by-laws is, as a matter of course, authority to pass such as are consistent with the articles of incorporation *and not* a power to subvert the law of corporate existence."

and contended that the action of the State Supreme Court in holding otherwise was repugnant to the provisions of the Fourteenth Amendment of the Federal Constitution (R. 144), and as certified by the Chief Justice of the State Supreme Court in certifying the record as being the record on this appeal (R. 61 and 62), certified to the fact that the "Department" considered the appellant's Petition and Supplemental Petition for rehearing and adhered to its opinion of January 18, 1943, and refused to correct its manifest error

in holding that a By-Law was on a higher plane than the articles of incorporation and denies the appellant's Petition and Supplemental Petition on March 26, 1943, and thereafter on March 29, 1943, entered its judgment (R. 45) from which judgment this appeal was taken.

COPY OF OPINION ON RENDITION OF JUDGMENT

A copy of the opinion of the Supreme Court of the State of Washington, which has not yet appeared in official book form, but which is certified by the Chief Justice of that Supreme Court in the unprinted record herein (R. 15 to 43), designated as Exhibit "A," is hereto attached and by reference made a part hereof.

CASES BELIVED TO SUSTAIN JURISDICTION

In *People of the State of New York ex rel. W. Bryant, v. Charles F. Zimmerman*, 278 U. S. 63, 67, 73 Law ed. 184, 187, this Court held:

> "There are various ways in which the validity of a state statute may be drawn in question on the grounds that it is repugnant to the Constitution of the United States. No particular form of words or phrases is essential, but only that the claim of invalidity, and the grounds therefor be brought to the attention of the state court with fair precision and in due time. And if the record as a whole shows either expressly or by clear in-

tentment that this was done, the claim is to be regarded as having been adequately presented."

In *Lawrenc v. Tax Commission*, 286 U. S. 276, 282, 76 Law ed. 1102, 1106, this Court held:

"The Constitution, which guarantees rights and immunities to the citizen, likewise insures to him the privilege of having those rights and immunities judicially declared and protected when such judcial action is properly invoked. Even though the claimed constitutional protection be denied on non-federal grounds, it is the province of this Court to inquire whether the decision of the State Court rests upon a fair or substantial basis. If unsubstantial, constitutional obligaions may not be thus denied."

In *State of Missouri v. Frederick Gehner*, 281 U. S. 313, 320, 74 Law ed. 870, 875, this Court held:

"It is well settled that this court will not consider questions that were not properly presented for decision in the highest court of the state. Ordinarily it will not consider contentions first made in a petition to the state supreme court for rehearing where the petition is d e n i e d without more. * * * But here the company at the first opportunity, invoked the protection of the Federal Constitution and statute. It could not earlier have assailed the section as violative of the Constitution and laws of the United States."

In *Great Northern R. Co. v. Sunburst Oil & Refining Co.*, 287 U. S. 358, 367, 77 Law ed. 360, 368, this Court held:

"The rule, general as it is, does not extend to cases where the constitutional question, however tardily raised, is considered and decided * * *,

> nor does it apply where the grounds of the decision supply a new and unexpected basis for the claim by the defeated party of the denial of a Federal right."

The question of whether a corporation had power under the Uniform Business Corporation Act, as heretofore discussed, to pass a "By-Law" that was in conflict and inconsistent with its articles of incorporation, as to number of the Board of Trustees that were authorized to transact any of its business was before the trial court and also before the State Supreme Court, but the State Supreme Court went a step further and in legal effect by its opinion held it had power and authority to re-write a new by-law, which provided that "A majority of the trustees then in office of a Board of Seven Trustees constituted a quorum for the transaction of business of the appellant corporation and therefore for the first time in substance and legal effect held it had power to violate the provisions of the Fourteenth Amendment to the Constitution of the United States, in the manner as heretofore stated it did so violate said Amendment and the appellant at the first opportunity it had available to it raised the question that the action of the State Supreme Court in so doing was repugnant to the provisions of the Fourteenth Amendment to the Constitution of the United States.

Other cases which the appellant believes sustain the jurisdiction of this Court of this instant appeal are:

Potier v. Rodman, 261 U. S. 307, 311, 67 Law ed. 670, 672;

Milheim v. Moffat Tunnel District, 262 U. S. 710, 717, 67 Law ed. 1194, 1199;

Davis v. Wechler, 263 U. S. 22, 24, 68 Law ed. 143, 145;

Fiske v. Kansas, 274 U. S. 380, 385, 71 Law ed. 1108;

Almo Lovell v. Griffin, 343 U. S. 444, 453, 82 Law ed. 949.

And appellant respectfully submits, that this Honorable Court should review the instant case and settle the rights of the stockholders of not only this instant corporation, but of all corporations from being deprived of their property and property rights without due process of law within the meaning of the Fourteenth Amendment to the Constitution of the United States.

Respectfully submitted,

CLARENCE C. DILL,
E. A. CORNELIUS,
Attorneys for Appellant.

EXHIBIT A

IN THE

SUPREME COURT

OF THE

State of Washington

Appeal from the Judgment and Decree of the Superior Court of Grant County, State of Washington

TWISP MINING & SMELTING COMPANY, a corporation, *Appellant*, vs. CHELAN MINING COMPANY, a corporation; SEATTLE-FIRST NATIONAL BANK, acting through its Spokane & Eastern Branch, as Receiver of the ALDER GROUP MINING & SMELTING COMAPNY, a dissolved corporation; and METHOW GOLD CORPORATION, a corporation, *Respondents*.	No. 28798 Department One Filed Jan. 18, 1943

This action was brought by Twisp Mining & Smelting Company, a Washington corporation (which will hereinafter be referred to as Twisp), in the superior court for Okanogan county, against Chelan Mining Company, a corporation, Seattle-First National Bank, acting through its Spokane & Eastern Branch, a corporation, as receiver of the Alder Group Mining & Smelting Company, a dissolved corporation, and Met-

how Gold Corporation, for the purpose of obtaining a decree declaring the following instruments void and of no force and effect, to-wit: A deed dated January 31, 1934, executed in the name of plaintiff, conveying to Robert H. Strong the property described in paragraph 5 of the complaint; a deed from Robert H. Strong and wife to Chelan Mining Company, conveying the same property; a deed from Chelan Mining Company to Robert S. Lewis and Fred B. Morrill, as the surviving trustees of the Alder Group Mining & Smelting Company (hereinafter referred to as the Alder Group), conveying to such trustees the same property; a lease dated January 23, 1939, from Robert S. Lewis and Fred B. Morrill, as sole surviving trustees of the Alder Group, to Mahlon McCain and Chas. W. Gillespie; and the assignment of such lease, dated February 21, 1939, from McCain and Gillespie to Methow Gold Corporation.

Plaintiff further asked that it be decreed to be the owner, free and clear of all claims of all the defendants, of the property described in paragraph 5 of the complaint, excepting Alder Creek, Methow, and Twisp Lode mining claims, patented as survey No. 989, and as to those claims that plaintiff be entitled to the possession thereof under a contract of purchase dated November 23, 1927; that the title and possession of such property be quieted in plaintiff against the claims and demands of each and all of the defendants; that defendants be enjoined from claiming any title or interest adverse to plaintiff in the property, excepting

the fee simple ownership of the Alder Creek, Methow and Twisp Lode patented mining claims, the fee simple title to which rests in the receiver of the Alder Group, subject to the possessory rights of plaintiff.

Plaintiff also asked for an accounting of the ore removed from the property.

The complaint as amended in substance alleged that plaintiff was the owner in fee simple of homestead entry No. 188, comprising tracts A and B, and homestead entry No. 247, embracing a portion of sections 25 and 26, in township 33 N. R. 21 E. W. M., and possessory rights under an executory contract of purchase of the Alder Creek, Methow and Twisp Lode mining claims, made and entered into November 23, 1927, by and between the Alder Group, as first party, and John L. Magney, as second party, and also possessory rights in and to certain unpatented mining claims.

Title to the three patented claims, Alder Creek, Methow and Twisp Lode claims, is deraigned through assignments of the contract of November 23, 1927, by John L. Magney and wife to the Alder Development Company, a corporation, under date of December 3, 1928, and subsequent assignment from the Alder Development Company to plaintiff. Title to homestead entries Nos. 188 and 247, was obtained by deed from the Alder Investment Company, dated July 12, 1930, and title to the unpatented claims by deed from the Alder Development Company, dated July 12, 1930.

It is further alleged that on January 30, 1934, three members of the board of trustees of plaintiff passed a resolution to the effect that plaintiff sell, assign and convey to Robert H. Strong, or to a corporation to be formed by him, all the right, title and interest of plaintiff in and to the properties hereinbefore referred to, together with machinery, equipment, supplies, etc., then being used on or belonging to the property; that in consideration for such transfer, Mr. Strong was to have issued to plaintiff a one-tenth share of all authorized capital stock of the company to be formed by him. It is further alleged that the above resolution adopted by three trustees was void and of no force or effect, for the reason that no quorum was present authorized to transact business for plaintiff, and that the deed executed on January 31, 1934, pursuant to such resolution, signed on behalf of plaintiff by John C. Sawbridge, as president, and James O. Cull, as assistant secretary, was null and void.

It is further alleged that Mr. Strong, by reason of his presence at a meeting of plaintiff on January 17, 1934, knew that a legal quorum was not present to transact business, and that the knowledge of Mr. Strong was imputed to the Chelan Mining Company, formed by Mr. Strong to take over the property of plaintiff, and to which company Mr. Strong conveyed the property acquired by him from plaintiff on January 31, 1934.

It is further alleged that no stockholders meeting of plaintiff was held from December 27, 1930, to April

5, 1939, at which time a new board of directors was elected, and that immediately thereafter plaintiff, acting pursuant to a resolution passed by the new directors, repudiated all attempted acts of the three directors on January 17 and January 30, 1934.

It is further alleged that the attempt to pass the resolution of January 30, 1934, authorizing the conveyance to Mr. Strong, has never been ratified by plaintiff.

It is also alleged that the Alder Group was stricken from the rolls of the secretary of state on July 1, 1922, for failure to pay its license fee, and on July 1, 1925, was automatically dissolved for non-payment of license fees, and as more than ten years have elapsed from July 1, 1925, such corporation, under existing law, could not now be reinstated.

The defendants answered separately, denying that the act of the trustees in passing the resolution of January 30, 1934, was null and void, and alleging that the act of the trustees in passing the resolution was valid, and that the deed issued pursuant thereto was in all respects valid. Defendants also pleaded ratification, estoppel, laches and the statutes of limitations.

The matter finally came on for hearing before the court on October 13, 1941, it appearing that during the course of the trial defendants had waived any claim made by them to a particular adjudication as to their respective rights, and the court, having denied plaintiff's motions for new trial and to reopen the case,

entered judgment to the effect that plaintiff take nothing by this action and that the action be dismissed with prejudice. From this judgment, plaintiff has appealed.

Appellant makes thirteen assignments of error. The following are those which we deem material to a consideration of the questions presented: The trial court erred in holding that three members of a board of seven trustees, at an informal gathering, legally represented appellant, and had a lawful right to transact business for appellant; in holding in substance that those three trustees had power and authority to appoint an assistant secretary; in holding there was any by-law of appellant which in any way prescribed something different from that which is in the statute in regard to what constitutes a quorum; in assuming there was a legal special meeting of the board of seven trustees held January 30, 1934, in further holding that those three trustees had any power or authority to pass a resolution of any kind which would be binding on appellant, and in not holding that the acts of those three trustees were *ultra vires* and absolutely void from their inception; in holding that there ever was any legal consummation of the illegal transaction of Robert H. Strong with the three trustees; in holding that the deed made in the name of appellant as grantor and Robert H. Strong, as grantee, on January 31, 1934, was a valid deed, and in not holding that it was a forged deed; in holding that under the facts of this case the doctrine of estoppel, or laches, or even

ratification, is applicable or available to respondents, by reason of the fact that the deed being a forged deed, no life could be breathed into it under any circumstances; in denying appellant's motion to reopen the case for further evidence, and in denying appellant's motion for new trial; and in entering judgment dismissing appellant's action.

It may be stated that this case was not presented to this court by the same counsel who tried the case for appellant, and we assume that the briefs filed were not prepared by counsel who tried the case. We make this statement for the reason that counsel for appellant in this court makes some claim that the deed executed on behalf of appellant on January 31, 1934, was a forgery. No such claim or contention was made or presented to the trial court; in fact, no contention was made in the lower court that the then directors of appellant, or Mr. Strong, or Chelan Mining Company, acted other than in good faith. The case was tried by appellant purely upon the theory that there was no quorum of the directors present on January 17, or January 30, 1934, authorized to pass the resolution, and that therefore the resolution passed on January 17, and adopted on January 30, 1934, was null and void, and the deed executed pursuant to such resolution was also null and void. We therefore cannot consider the claim now made in this court that the deed was a forgery.

The history of part of the property here involved

starts back in about 1905, when a Mr. Lewis and associates, of Fargo, North Dakota, acquired some interest in the then unpatented Alder Creek, M e t h o w and Twisp Lode mining claims, in Okanogan county. In 1905, Mr. Fred B. Morrill, an attorney of Spokane, who had formerly lived in Fargo, purchased these claims for Mr. Lewis and associates, and thereafter, in 1906, formed the Alder Group Mining & Smelting Company as a Washington corporation. The stockholders of this company were all Fargo men, with the exception of Mr. Morrill, who took one share of stock. Patent to the above claims subsequently issued to the Alder Group in 1909.

On November 23, 1927, the Alder Group entered into an agreement with John L. Magney, whereby Alder Group, as vendor, agreed to sell to Mr. Magney, and Mr. Magney agreed to buy, the mining claims. The contract price for such property was to be three hundred thousand dollars, to be paid out of the gross values produced through smelting, refining or other processing of the metals taken from the property. The contract also contained many other provisions relative to the work to be done on the property and payment of taxes, and provided for forfeiture upon thirty days' notice.

Apparently Mr. Morrill had nothing to do with this property after he had formed the corporation in 1906, until 1932, when Mr. Lewis forwarded to him the Magney contract, asking him to start proceedings to

forfeit the contract, also requesting Mr. Morrill to appear and defend against labor and materialmen's liens which had been filed against the property, amounting to some ten or twelve thousand dollars.

Mr. Morrill testified that on January 19, 1932, a notice of forfeiture was served on John L. Magney, the Alder Development Company, to which Mr. Magney had assigned his contract with the Alder Group, and also on the Alder Metals Corporation, a holding company for Alder Development Company.

On August 24, 1932, Mr. Morrill brought an action in Spokane county, to cancel the Magney contract. The summons and complaint in this action was personally served on Mr. Magney, the Alder Development Company, and Alder Metals Corporation. None of these defendants appeared in the action, and thereafter the court in that proceeding entered a judgment of forfeiture, from which no appeal has been taken. Mr. Morrill stated that at the time he started the above action, there was nothing of record showing that Twisp had or claimed any interest in the property.

We now desire to consider briefly the Alder Development Company, of which John L. Magney was president at the time the present action was begun, he having been vice-president and a director prior to that time. This Alder Development Company (which will hereinafter be referred to as Alder should not be confused with the Alder Group Mining & Smelting Company, in which Mr. Magney had no interest.

On November 2, 1928, Mr. Magney assigned to Alder all his right, title and interest in and to the contract he had with Alder Group. There is testimony to the effect that Mr. Magney and Alder expended considerable money on the Alder Creek, Methow and Twisp Lode mining claims, in building roads, installing machinery, and doing research and other work, but the property was never brought to a point where it was producing, and it appears that during the time the property was held by Magney and Alder, many claims were filed against it, taxes were not paid, and work was not done in accordance with the contract of November 23rd. All these failures and others were the basis of the forfeiture action brought by Mr. Morrill.

In the later summer of 1930, Mr. Magney, representing Alder, went to Yakima, which was the home of John Sawbridge, and together they discussed the matter of forming a corporation to take over the property held by Alder and the property of an Oregon mining company, called Monumental, in which Mr. Sawbridge was interested. At this time, Mr. Magney, in addition to being a director and vice-president of Alder, had been appointed to look after the interests of the stockholders of Alder in any deal that should be made. Under the plan, the new corporation was to issue to Alder 450,000 shares of its stock to Monumental, for its property.

Articles of incorporation of appellant were prepared by Mr. Cull, of Yakima, in August, 1930, the original incorporators being Leslie M. Rose, W. V. Coons,

Harold Simonds, C. M. Hull, John Sawbridge, all of Yakima, B. F. Tilsley, of Spokane, and G. B. Richardson, of Tacoma. The articles were filed November 10, 1930.

Mr. Cull acted as counsel for Twisp at all times from its beginning to April 5, 1939. All of the Yakima men above mentioned were apparently men of high standing in their community, and some of them had been or were interested in the Sunshine mine.

The first meeting of appellant, as appears from appellant's exhibit No. 7, which purports to be the minutes of appellant from the time of its first meeting to and including the meeting of January 30, 1934, was held in Yakima on December 27, 1930. Present at this meeting were W. V. Coons, Leslie M. Rose, John Sawbridge, Harold Simonds and C. M. Hull. Neither Mr. Tilsley nor Mr. Richardson was present. At this meeting Mr. Sawbridge was chosen chairman, and the following officers elected: John Sawbridge, president, B. F. Tilsley, vice-president, and Harold Simonds, secretary and treasurer.

Mr. Sawbridge stated that appellant was formed for the purpose of taking over the property of Alder and Monumental, and a resolution was passed to take over these properties.

Apparently the instruments conveying the property of Alder to Twisp were brought to Yakima at this time and turned over to Mr. Cull, to be held in escrow until certain conditions had been met.

The next meeting of Twisp was on March 28, 1932, at which Sawbridge, Simonds, Coons, Hull and Rose were present. Roy K. Magney, son of John Magney, Charles W. Julian and John B. Hottel were also present, representing Alder. Mr. Cull informed the board that Mr. Rose and Mr. Richardson had tendered their resignations as trustees, and he also stated that he still held in escrow the instruments of conveyance of Alder.

The representatives of Alder then proposed that Twisp proceed to take over the property of Alder, in accordance with the proposition made by John Magney in 1930, regardless of whether Twisp acquired the property of Monumental or not. A resolution to acquire the property of Alder was then passed. It stated that up to that time no property had been acquired by Twisp.

It may be stated here that the authorized capital stock of Twisp was $62,500, divided into 2,500,000 shares, of the par value of two and one-half cents each.

During 1931, Mr. John Magney and Mr. Sawbridge had attempted to formulate some plan to raise money to pay off the indebtedness against this property, but without success.

After notice of forfeiture had been served on Mr. John Magney and Alder, the Magneys went to Yakima and informed the directors of Twisp that something would have to be done to save the property, and it was suggested that they forget about the Monumental

stock and go ahead and take over the Alder property and issue to Alder 450,000 shares of Twisp stock; that by transferring this property to Twisp, it would provide a background of actual property rights for Twisp, so it could go out and raise money to pay off the indebtedness against the property. A new resolution was then passed to take over just the property of Alder.

The next meeting of Twisp, as appears from exhibit 7, was on March 29, 1932, Sawbridge, Coons, Hull and Simonds being present. Roy Magney, Julian and Hottel were present, representing Alder. Mr. Cull reported a vacancy on the board by reason of the failure of Mr. Tilsley to qualify, and that Richardson and Rose had tendered their resignations. Motion was then made and carried by unanimous vote of the four trustees present that the resignations of Richardson and Rose be accepted, and the board proceed to fill the three vacancies caused by failure of Tilsley to qualify and the resignations of Rose and Richardson. Charles Julian, John Hottel and Roy Magney were elected by vote of the four directors to fill the vacancies. These three men then took the oath of office and participated in the further actions of the board.

At this meeting, the plans of the company were discussed, also the obligations against the property of Alder, which was to be conveyed to Twisp. From this discussion it appeared that it was necessary to raise at least seven thousand dollars immediately, to pay

pressing claims. Julian, Hottel and Magney were appointed as a formal committee to look after these matters. A resolution was passed to set aside 800,000 shares of treasury stock, to be sold to pay outstanding indebtedness.

We think it might be well to state here that article 5 of the articles of incorporation provides that the powers of the corporation were to be exercised through, and its business conducted by, a board of seven trustees. Section 5, article 2, of the by-laws, provides that special meetings of the board shall be held when called by the president, or by one-third of the trustees *for the time being in office*. The secretary shall give to each trustee notice by mail of each special meeting, the same to be at least one day before the meeting.

Section 6, article 2, of the by-laws, provides:

> "A majority of the board of trustees, *for the time being in office*, shall constitute a quorum for the transaction of business, but, if at any meeting of the board there shall be less than a quorum present, a majority of those present may adjourn the meeting from time to time until a quorum shall be present." (Italics ours)

As appears from exhibit 7, a notice of a meeting to be held on July 18, 1932, was given by the president. However, a meeting was not held on that date, but on August 15, 1932. Directors Julian, Hottel and Roy Magney, by telegrams dated August 15, 1932, consented to the meeting of August 15th, which was called

to consider a proposal of one Goetz to purchase stock of the company, and to consider the resignations of certain trustees and officers. Trustees present at this August 15th meeting were Sawbridge, Hull, Coons and Simonds.

It is apparent from the minutes of Twisp that from the formation of the company, its affairs were handled and permitted to be conducted very largely by directors Sawbridge, Coons, Hull and Simonds, assisted by Mr. Cull, as counsel. According to Mr. Cull, the four men last above mentioned are the men with whom the Magneys consulted when they went to Yakima. John Goetz, who proposed to purchase 1,500,000 shares of the capital stock of Twisp, had been brought to Yakima by some member of the Magney-Julian-Hottel finance committee. Mr. Cull testified that as a part of the Goetz deal, Hottel and Julian were to retire from the board, and Goetz and one MacDonald were to be elected trustees in their places. Mr. Hottel and Mr. Julian did tender their resignations as trustees, and such resignations were accepted, the four trustees voting. Mr. Goetz was then elected to fill the vacancy caused by the resignation of Hottel, and Frederick C. MacDonald to fill the vacancy of Julian. Mr. Sawbridge tendered his resignation as president, to take effect at the close of the meeting, and Mr. Goetz, who apparently was not present at this meeting, was elected president, to take effect upon his qualifying as a trustee. Mr. Cull was ordered to forward to Mr. Goetz and Mr. MacDonald proper forms of oath.

It is one of the contentions of appellant that, as the result of this meeting, Mr. Goetz and Mr. MacDonald were elected and became trustees, and Mr. Goetz president, regardless of the fact, as Mr. Cull testified, that neither of them ever took the oath as a trustee, never qualified in any way as a trustee, and never attended a meeting of Twisp or participated in any meeting as a trustee or officer, and regardless of the fact that it seems to be undisputed that Mr. Cull was never able to get in touch with Mr. Goetz, and that shortly after this time he seems to have passed out of the picture and his whereabouts were not known.

As appears from exhibit 7, the next special meeting of Twisp was called for January 17, 1934. During the time between the last meeting, held August 15, 1932, and this meeting, efforts had been made by the finance committee of Twisp to raise money to pay off the pressing claims against the property, but without success, and Twisp had just marked time, in so far as any development work on the property was concerned. During this time, Mr. Robert H. Strong, of Portland, had been contacted, and he finally made a proposition to Twisp, and a special meeting was called for January 17, 1934, to consider his plan, which in general was that Twisp convey to Mr. Strong, or to a corporation to be formed by him, the property of Twisp, and as consideration of such transfer, there would be issued to Twisp one-tenth of the capital stock of the company to be formed by Mr. Strong. In addition, Mr.

Strong agreed to negotiate for and attempt to acquire any and all adverse outstanding rights and interests in the property.

According to exhibit 7, at the meeting *in the morning of January 17th,* a quorum was not present, and the meeting was adjourned to eight P. M. of the 17th. At the evening meeting, John Sawbridge, president, presided, and in the absence of the regular secretary, Harold Simonds, Mr. Cull acted as secretary *pro tem,* the by-laws providing for such *pro tem* appointment. Trustees present were Sawbridge, Coons and Hull. Mr. Cull reported that there were two vacancies on the board, due to the failure of Mr. Goetz and Mr. MacDonald to qualify as trustees. Mr. Cull further advised the board that neither Mr. Goetz nor Mr. MacDonald had participated in any meeting or proceeding in connection with company business. He also advised the board it was not necessary to fill these vacancies at that time, as there were five qualified trustees, namely, Sawbridge, Coons, Hull, Simonds and Roy Magney. A resolution was then passed, declaring that two vacancies existed on the board by reason of the failure of Goetz and MacDonald to qualify as trustees.

Mr. Strong was present at this meeting, with his attorney, Mr. Cole. Mr. Strong submitted his proposition to the board, and after discussion a resolution was passed, accepting Mr. Strong's offer. The following paragraph of the resolution shows to some

extent the condition of Twisp and its inability to finance or develop this property as of January 17, 1934:

> "WHEREAS, since its organization and the acquisition by it of the said mining property and property rights, the company has not been able to finance the development and operation of said property or to comply with the terms and conditions of certain instruments upon the performances of which its right to certain portions of said property depends; and the company now owes matured obligations in an amount in excess of $6000.00, which it is unable to meet or discharge * * *."

The resolution further provided that the conveyance from Twisp should be executed by the president and attested by the secretary or assistant secretary.

Mr. Cull reported that he had received a telegram from Harold Simonds, consenting to the holding of this special meeting, and endorsing the action taken by the trustees present. A motion was then made and carried by the unanimous vote of the trustees present that a special meeting of the board of trustees be called by the president, upon written notice mailed to all members of the board at their last known addresses, at least eight days prior to the date of such meeting; that such meeting be called for January 30, 1934, at the hour of two P. M.; and that at such meeting the proposition of Mr. Strong, the action thereon at this meeting, and the resolution relating to such proposition, as adopted at this meeting, be submitted for ac-

ceptance, approval and ratification by the board of trustees.

A notice of the meeting of January 30, 1934, signed by John C. Sawbridge, as president, dated January 19, 1934, to which was attached a copy of the resolution passed at the January 17th meeting, was mailed to each of the five directors, at his last known address, on January 19, 1934, as appears from the affidavit of James O. Cull.

On January 20, 1934, Harold Simonds wrote on the copy of the notice received by him the following:

> "I shall be unable to attend the meeting referred to in the notice; but I hereby approve, ratify, and confirm the foregoing resolution to be adopted at said meeting, the same as if I were personally present and voted affirmatively for its adoption.
> Asotin, Wash. January 20, 1934.
> (Sd.) HAROLD SIMONDS"

Mr. Cull testified that he tried to locate Roy Magney, writing several letters, and on January 23rd, he was informed that Mr. Magney's address was Denver. On January 24th, he mailed to Mr. Roy Magney, at this address in Denver, a copy of the notice of the meeting of January 30th, together with a copy of the resolution. Apparently this notice to Mr. Magney was in addition to the one mailed on January 19th. While on the stand, Mr. Magney admitted that he received the notice and a copy of the resolution at Leadville, Colorado, three days after the meeting.

It might be well to here again call attention to section 5, article 2, of the by-laws, which provides that special meetings may be called by the president, and the secretary shall give notice of each special meeting by mail, the same to be at least two days before the meeting, or by telegraph at least one day before the meeting.

We now come to the special meeting of January 30, 1934, at which meeting the following trustees were present: John Sawbridge, C. M. Hull, W. V. Coons. The matter of filling the vacancies on the board caused by the failure of Goetz and MacDonald to qualify was again discussed, and a motion was made and carried that the vacancies be not filled at that time, as there were five trustees qualified to act.

A motion was then made and carried by the unanimous vote of the three trustees, namely, Mr. Sawbridge, Mr. Hull and Mr. Coons, they being a majority of the five trustees then constituting the board, that the resolution passed at the meeting of January 17, 1934, be adopted. The resolution was adopted, the three trustees voting for adoption. This resolution contained a provision appointing Mr. James O. Cull assistant secretary, with full power to act, and purporting to give to Mr. Cull specific power and authority to execute any and all instruments required by the resolution for transfer of the Twisp property adopted at this meeting, and to affix the corporate seal. The appointment of Mr. Cull as assistant secretary was

made pursuant to section 1, article 3, of the by-laws, which provides that in addition to the officers therein named, the trustees shall have authority to provide for other officers.

It was pursuant to this resolution that Mr. John Sawbridge, as president, and Mr. James Cull, as assistant secretary, executed and delivered to Mr. Strong the deed of January 31, 1934, here in question.

Mr. Strong formed the Chelan Mining Company, pursuant to his agreement with Twisp, and after the conveyance by Mr. Strong and wife to Chelan Mining Company, that company issued to Twisp 250,000 shares of its stock, which were delivered to Mr. Cull and receipted for by him. Twisp still holds this stock.

Chelan Mining Company (hereinafter referred to as Chelan) went into possession of the property acquired from Twisp, and very largely acting through Mr. Strong, proceeded to pay off and settle the claims against the property. It appears without dispute that Chelan expended a considerable sum of money, in addition to stock issued in settling claims, paying taxes due and for assessment work. Mr. Strong, on behalf of Chelan, made many trips in an attempt to interest certain mining interests in the development of the property, and while some of these parties investigated the property, they refused to invest. Chelan also, on October 8, 1934, apparently feeling that the Magney contract of November 23, 1927, had been forfeited, or at least that it was doubtful what title to the Alder

Creek, Methow and Twisp Lode mining claims had been acquired under that contract, entered into a new contract with the Alder Group.

During the time Chelan held this property, the company was contacted by Mr. John Magney, as appears by Chelan's exhibit No. 30, which consists of a series of letters and telegrams covering the period from October 17, 1935, to June 5, 1936. These letters indicate that Mr. Magney had made to Mr. Strong, for Chelan, a proposition to take over its property; in fact, Mr. Magney had a contract drawn for that purpose. However, Mr. Magney was not able to meet the requirements of Chelan, and the deal fell through. Mr. Roy Magney, who it will be remembered was a director of Twisp, contacted, or at least attempted to contact, Mr. Strong on behalf of his father, John Magney, during the above period.

It also appears from exhibit 31, consisting of a series of letters and telegrams, covering a period from April, 1931, to April, 1937, that Roy Magney and two associates obtained a contract on this property. This contract, dated March 16, 1937, was forfeited and canceled, for the reason, as testified by Roy Magney, that they could not comply with its terms.

Up to this time, no objection had been made by John Magney or Roy Magney, or any director or stockholder, to the Twisp deed to Mr. Strong, or any of the proceedings leading up to the execution of that deed, although the books of Twisp had been avail-

able, the deed from Twisp was of record, and Chelan had been in possession of the property.

It appears that the first time any objection was made to the meetings of January 17 and 30, 1934, and the deed of January 31, 1934, was in February, 1938, when John Magney went to Yakima, with his attorney, and called a meeting of the directors, at which he made the claim that the transfer to Mr. Strong was not valid, and told Twisp that if it did not start an action to set aside the transfer, he would. Roy Magney was also present at this meeting. Apparently after the transfer of January 31, 1934, Twisp had again just marked time, and had allowed its license fees to become delinquent, as it had been stricken by the secretary of state for failure to pay its license fees.

Up to this time, the stock which Twisp was to issue to Alder had never actually been issued, and at this meeting, John Magney asked that the 450,000 shares of stock be issued to Alder. Mr. Cull stated that at that time Twisp could be reinstated. So far as shown by the minutes of Twisp, after its purchase of the Alder property the only stockholders of Twisp were the Alder Development Company, which was entitled to 450,000 shares of stock, and the acting directors, who each had one hundred shares. Mr. Cull testified that John Magney, or Roy Magney, or both, represented Alder.

Respondent Methow Gold Corporation is claiming rights to the possession of this property under and

by virtue of a quit-claim deed dated January 17, 1939, from Chelan Mining Company to Robert S. Lewis and Fred B. Morrill, sole surviving trustees of the Alder Group Mining & Smelting Company, a lease from Robert S. Lewis and Fred B. Morrill, as such trustees, to Mahlon McCain and Charles W. Gillespie, dated January 23, 1939, and an assignment from Gillespie and McCain of their interest in the lease, dated February 21, 1939, to Methow Gold Corporation, and an agreement entered into between the receiver of the Alder Group and Methow Gold Corporation, dated July 27, 1939.

Going back again to Twisp, it appears from appellant's exhibit 16 that the next meeting of Twisp after January 30, 1934, was a stockholders meeting held at Yakima on April 5, 1939, attended by the following persons: James O. Cull, Roy Magney, Roy D. Huston, John C. Sawbridge, K. H. Blaesser, Hugh M. Gano, John L. Magney, E. J. Keogh, and N. Beglar. Roy Magney was appointed chairman of this meeting, and Blaesser secretary. It was disclosed that no stockholders meeting had been held since the corporation was formed in 1930. It was also disclosed that there were outstanding 455,500 shares of stock. The stock represented at this meeting was as follows:

100 shares—John C. Sawbridge
40 shares—Roy K. Magney
10 shares—Roy D. Huston
10 shares—N. Beglar
10 shares—Hugh M. Gano
10 shares—E. J. Keogh

10 shares—J. L. Magney
10 shares—K. H. Blaesser
450,000 shares—Alder Development Company, by John L. Magney, president.

Stock issued and not represented:

5,000 shares—John B. Hottel
100 shares—Harold Simonds
100 shares—C. M. Hull
100 shares—W. V. Coons.

At this meeting the following directors were elected: John L. Magney, Roy K. Magney, K. H. Blaesser, E. J. Keogh, Hugh M. Gano, Roy D. Huston and N. Beglar. A meeting of the directors was held immediately after the stockholders meeting, and the following officers elected: John L. Magney, president, Roy K. Magney, vice-president, and K. H. Blaesser, secretary and treasurer.

On April 24, 1939, at an adjourned meeting of the directors held in Spokane, to which place the office of the company had been removed, the following members of the board were present: John L. Magney, E. J. Keogh, K. H. Blaesser, Hugh M. Gano and Nellie M. Beglar. At this meeting the new directors disapproved all the acts of the old directors relative to the meetings of January 17 and 30, 1934, pertaining to the resolution authorizing a conveyance to Mr. Strong, and authorized the new board to take legal steps to set aside the deed of January 31, 1934, and to recover possession of the property.

While it does not appear definitely that the minutes

of Twisp, as shown by exhibits 7 and 16, are all the meetings that were held, the minutes as shown by these exhibits are all that are before us. From these minutes, it does not appear when or in what manner John Magney, Roy Huston, K. H. Blaesser, Hugh Gano, E. J. Keogh and N. Beglar became stockholders in Twisp, as they were not stockholders on January 30, 1934, as shown by exhibit 7. It is interesting to note that each of the last named stockholders had ten shares of stock in Twisp, the par value of which was two and one-half cents a share. It is also apparent that in this last set-up of Twisp, John Magney is the dominating figure.

It may also be noted that the above action by Twisp was not authorized until more than five years after the deed from Twisp to Mr. Strong, on January 31, 1934, and not until after the Methow Gold Corporation had taken possession of the property and were shipping ore.

While argument is made in appellant's brief that the deed of January 31, 1934, was a forgery, and other statements are made which would seem to question the good faith of the old directors and Mr. Strong, we desire to state again that the complaint contains no allegation of fraud or unfair dealing or conspiracy on the part of anyone connected with the Strong transaction, but to the contrary, it appears from the statement of facts that counsel who represented appellant at the trial of this action disclaimed any such contention, resting his case entirely on the theory that the

deed was void because there was no quorum of the directors present at either the meeting of January 17 or January 30, 1934, when the resolution was passed authorizing the transfer to Strong.

Since the execution and delivery of the deed from Twisp to Chelan, the latter company, or its survivors in interest, have been at all times and are now in possession of the property, and have been improving it, and extracting and shipping ore.

We are convinced that the acting directors of Twisp in 1934 acted in good faith, and concluded there was nothing that could be done by them to finance the development of this property. Outstanding claims were pressing, taxes had not been paid, assessment work had not been done, and no attempt had been made to comply in any way with the Magney contract of November 23, 1927. All attempts of the directors, as well as those of John Magney, to finance this proposition had failed.

With this condition of affairs present, Mr. Strong came forward and offered to turn over to Twisp 250,000 shares of stock in the company to be formed by him, and offered to attempt to obtain a settlement of all outstanding claims and interests against the property. The deal was made, and Chelan complied in every respect with the agreement made by Mr. Strong.

Considerable is said in appellant's brief about the failure to call a stockholders meeting. In answer to

this it may be said that there was in fact no stock actually issued other than possibly to the then directors of Twisp, until just before the meeting of April 5, 1939, when the stock to Alder was issued, so that the meeting of the directors was in fact a meeting of the stockholders, with the exception of the stock to which Alder was entitled, but which, as we have said, had not actually been issued, and we are convinced that Alder had notice of all that was done, through Roy Magney, or John Magney, or both.

Whatever term may be given to this action, it is evident that unless the deed from Twisp to Mr. Strong, of January 31, 1934, be declared null and void, appellant cannot prevail.

The first question, then, to be considered is whether or not the deed of January 31, 1934, was valid, and transferred to Mr. Strong the interest of Twisp in the property.

Appellant contends that the articles of incorporation provide that the business of the company must be conducted by a board of seven directors, and that since the resolution of January 17 and 30, 1934, was passed and adopted at a meeting where only three directors were present, a legal quorum of directors was not present to hold a meeting or pass such a resolution, and that the deed executed pursuant to such resolution was therefore a nullity, and did not bind Twisp. All the respondents contend this was a valid deed.

It is true the articles do provide the powers of the

corporation shall be exercised through a board of seven trustees. It is also true that the articles do not say how many trustees shall constitute a quorum to transact business. However, section 6, of article 2, of the by-laws, provides that a majority of the board of trustees, *for the time being in office,* shall constitute a quorum for the transaction of business. We are satisfied that neither Mr. Goetz nor Mr. MacDonald were trustees of Twisp on January 17 or 30, 1934. They had never qualified as trustees, and their offices had been declared vacant.

This being true, there were on January 17 and 30, 1934, only five trustees of Twisp who were qualified to act, namely, Mr. Sawbridge, Mr. Coons, Mr. Hull, Mr. Simonds, and Roy Magney, and respondents contend, we think correctly, that there being only five trustees "then in office," three of them constituted a quorum to transact business, under section 6, article 2, of the by-laws, and that the acts of the three directors were valid acts of the board and bound the corporation.

Appellant further contends that to so construe section 6, of article 2, of the by-laws, would be contrary to the articles of incorporation, and also contrary to the provisions of Rem. Rev. Stat. (Sup.), § 3803-31, paragraph III, subd. "d," which provides:

> "A majority of the board of directors shall be necessary to constitute a quorum for the transaction of business, and the acts of a majority of the directors present at a meeting at which a

quorum is present shall be the acts of the board of directors."

While appellant quotes the provisions of subd. "d" above set out, it does not quote all of paragraph III. This paragraph starts out with the following statement:

> "The number, qualifications, terms of office, manner of election, time and place of meeting, and the powers and duties of the directors may, subject to the provisions of this act, be prescribed by the articles or by-laws. *Except as otherwise prescribed in the articles or by-laws:* * * *." (Italics ours)

Then follow certain subdivisions, among them subdivision "d," quoted by appellant.

Appellant does not contend that there was anything wrong in temporarily having only five trustees, but does contend that to have a quorum present there must be a majority of seven trustees present, and not a majority of the five then in office.

In view of the fact that the articles contained no provision relative to a quorum, we are of the opinion it was within the power of the corporation to pass a by-law prescribing the number of directors necessary to constitute a quorum for the transaction of business, unless such by-law was in conflict with Rem. Rev. Stat. (Sup.), § 3803-31, paragraph III.

We are of the opinion that the section last above cited "d," quoted by appellant, would not apply where the corporation, in either its articles or by-laws, had

provided what should constitute a quorum, as was done in this case.

Appellant argues that the overwhelming weight of authority, as stated in Fletcher's Cyc. of Corporations, vol. 2, p. 168, § 392, is that when the power to do particular acts, or general authority to manage the affairs of a corporation, is vested in a board of trustees, they are vested in the trustees not individually, but as a board, and the trustees can act so as to bind the corporation only when they act as a board and at a legal meeting. Appellant states that the rule and the reasons therefor are well stated in Ames v. Goldfield Merger Mines Co., 227 Fed. 292. We may admit the above rule is a correct statement of the law, but we fail to see where it is applicable here.

The meetings of January 17 and 30, 1934, were regularly called special meetings. The directors met as a board, and a quorum of the directors *then in office being present,* proceeded as a board to transact the business of the corporation, referred to in the notice given of such meetings.

It is also contended by appellant that the effect of what the trustees did was to change the number of trustees from seven to five, and that this could not be done, as this power was vested in the stockholders.

We do not believe there was any attempt by the directors in this case to change the number of trustees. For various reasons there had been vacancies on the board of trustees. Some of the vacancies had

been filled or attempted to be filled, but at the time of the meetings of January 17 and 30, 1934, there were two vacancies on the board, leaving but five trustees.

It seems to us perfectly plausible and reasonable that a situation such as here presented was contemplated at the time the by-laws were passed.

The next reference to Fletcher's Cyc. of Corporations is vol. 2, page 206, § 421, from which appellant quotes. This quotation is not applicable here, for the reason that it covers a situation where the by-laws provide "*that a majority of the directors* shall be necessary and sufficient to constitute a quorum," not a majority of the trustees then in office, as in the instant case.

A careful study of Fletcher will, in our opinion, reveal that the text recognizes that the number of directors of a corporation necessary to constitute a quorum may be fixed by the by-laws, if not incompatible with the articles or statutory law, and that a majority of that quorum may decide any question coming properly before such meeting, although the number of directors present may be less than a majority of the entire board. Fletcher's Cyc. of Corporations, vol. 2, p. 210, § 425. See, also, 13 Am. Jur. 918, § 960, where the rule is stated as follows:

> "Stating the rule in terms of necessity, it is equally well settled that a majority of the directors must be present at a meeting to constitute a quorum and enable the board to act and bind

> the corporation, *unless the power is given to a lesser number.* This is also the rule embodied in the Uniform Business Corporation Act." (Italics ours)

The authority cited by appellant does not purport to deal with a corporation which has a by-law such as we have in the instant case, and a discussion of such authority would therefore serve no purpose.

Having determined as a fact that there were but five trustees in office on January 17 and 30, 1934, whether or not a majority of that five constitutes a quorum is dependent entirely upon the interpretation of the section of the by-laws hereinbefore referred to, considered in connection with the articles and the statutory law. *Having been cited to no authority that would prohibit a corporation from passing such a by-law,* under conditions such as herein set out, we are of the opinion it was valid, and that the three directors, present and voting at the meeting of January 17 and 30, 1934, constituted a majority of the board then in office, that their acts were the valid acts of the board, and that the deed issued pursuant to the resolution adopted at the meeting of January 30, 1934, was a valid deed of the corporation.

We are also of the opinion that under the facts of this case and the law applicable thereto, appellant is now estopped from questioning the validity of the deed. It should be kept in mind at all times, and especially in answering this question, that there is no claimed fraud, unfair dealing, or conspiracy. It should

also be kept in mind that director Simonds consented to and ratified the action of the board, and while in our opinion it was not necessary to have the vote of Mr. Simonds to constitute a quorum, and while Mr. Simonds was not personally present at either the meeting of January 17th or January 30th (and we are not holding that he should be considered as present at those meetings), there can be no doubt that he did all that was possible for him to do to ratify the acts of the board, the same as he would have done if present.

It will also be remembered that Roy Magney, the fifth member of the board, was notified of the meeting of January 30th, which notice, together with a copy of the resolution, were received by him at Leadville, Colorado, three days after the meeting, but mailed six days before.

Twisp received and still has the 250,000 shares of stock of Chelan. The deed from Twisp to Chelan was recorded in February, 1934, and has at all times been constructive notice of the transfer therein described. Chelan and its successors in interest have been at all times in possession of the property, and have expended large sums of money in improving and working the property, and in paying claims against it, taxes, and for assessment work. Twisp has not offered to pay back any of the sums so expended.

No objection to the Strong transaction has ever been made by any director or stockholder of Twisp, except

the protest made by John Magney in 1938, and this was after John Magney and Roy Magney had attempted to get contracts on the property from Chelan.

While appellant contends that the acts of John and Roy Magney were their individual acts, and while they denied that they knew, prior to 1938, that only three directors had authorized the execution of the deed in question, we state frankly that we are unable to believe this could be true. At any rate, we are of the opinion that they had such notice as to put them on inquiry, and that under the facts in this case, the notice of John and Roy Magney was imputed to Alder.

We are satisfied that both Roy and John Magney knew, or should have known, of this by-law, Roy Magney because he was a director, and John Magney because of his connection with the formation of Twisp and his subsequent dealings with it as representative of Alder.

Some contention is made that Mr. Sawbridge was not president of Twisp at the time the deed of January 31st was executed, but that Mr. Goetz was president. We have hereinbefore held that Mr. Goetz never became a trustee of Twisp, and therefore never became president. Mr. Sawbridge, who had been president prior to December 15, 1932, continued to act as president, without objection, and was at least a *de facto* officer, if not a *de jure* officer.

We have consistently held that where a corporation allows a person in a large measure to control its busi-

ness transactions, the corporation must be held responsible for his acts in the name of the corporation, until it has been affirmatively shown that such acts were unauthorized. McKinley v. Mineral Hill Consolidated Mining Co., 46 Wash. 162, 89 Pac. 495. In the cited case, we also held that when a corporation receives the benefits of a transaction, it will not be heard to say that it neither authorized nor ratified the transaction.

Appellant contends that the acts of the three directors were *ultra vires,* and therefore void, and being void, such acts could not be ratified or the company estopped from questioning the validity of the deed.

In the first place, the acts of the three directors in passing the resolution of January 30, 1934, and the execution of the deed were not acts *ultra vires* the corporation, for clearly the corporation was not prohibited from passing such a resolution or from executing such a deed. The term "ultra vires," in so far as it applies to corporate transactions, is used to describe corporate transactions which are outside the objects for which the corporation was created, as defined in the law of its organization, and therefore beyond the power conferred on the corporation by the legislature. 19 C. J. S. 419, § 965; 13 Am. Jur. 784, § 754.

The general rule is that a corporation must act in the manner and with the formalities, if any, prescribed by its charter, or by the general law. However, a corporate transaction or contract which is with-

in the corporate powers, which is neither wrong in itself nor against public policy, but which is defective from a failure to observe in its execution a requirement of law enacted for the benefit or protection of a certain class, is voidable only, and is valid until avoided, not void until validated. 19 C. J. S. 423-4, § 968. Where the corporation has power to enter into the transaction or contract, neither party to it, who has had the benefit of it, can set up as a defense that the legal formalities were not complied with or that the power was improperly exercised. 19 C. J. S. 424, § 968. The corporation will be estopped to deny that it did contract in the manner provided by statute as against other persons who have acted on the assumption that the corporation has done what the law said it should do, and this is particularly true when the corporation retains the benefits of the transaction. 19 C. J. S. 424, § 968.

In Millett v. Mackie Mill Co., 193 Wash. 477, 76 P. (2d) 311, after stating

> "We have consistently held that the defense of *ultra vires* is not available to a corporation that has received, directly or indirectly, the benefits of the contract [citing many cases],"

we said:

> "We feel that the proper rule to be applied to this case is as is found in 3 Fletcher Cyc. Corp. (1917) 2616:
>
> " 'If the corporation which has entered into an ultra vires contract has received no benefits from

> the partial or full performance of the contract by the opposing party, it is not estopped to plead ultra vires.' "

It will thus be seen that in this state a corporation is estopped from claiming that an act was *ultra vires* the corporation where the contract was partially or fully performed by the other party, except in a case where it received no benefits from the transaction.

In the instant case, the transaction, in any event, was not *ultra vires* the corporation, and the corporation received 250,000 shares of stock in Chelan.

Many other cases might be cited to sustain our conclusion that Twisp and its present stockholders should, under the facts in this case, now be estopped from questioning the validity of the deed in question. It is difficult to find cases which are factually exactly like the instant case, or in many instances like any given case, but the facts in the cases cited are such as to justify us in holding that the principle therein announced is applicable to the facts in the instant case. Stilwell v. Merriam Co., 127 Wash. 116, 219 Pac. 836; Keyes v. Citizens State Bank, 128 Wash. 658, 224 Pac. 2; Belcher v. Webb, 176 Wash. 446, 29 P. (2d) 702; and Millett v. Mackie Mill Co., *supra,* and cases therein cited.

We also call attention to the discussion of this subject in the early case of Kirwin v. Washington Match Co., 37 Wash. 285 at 287, 79 Pac. 928.

While we are of the opinion the acts of the direc-

tors of Twisp in passing the resolution of January 17 and 30, 1934, and the execution of the deed of January 31, 1934, were ratified by the corporation and its then stockholders, we have not deemed it necessary to discuss this question, in view of our conclusion on the other questions presented.

For the reasons herein assigned, the judgment of the trial court is affirmed.

JEFFER, J.

We concur:
ROBINSON, J.
STEINERT, J.
MILLARD, J.
MALLERY, J.